

The Transfer of Property Act

Act No. IV of 1882

(As Amended by the Transfer of Property Amendment Act, XX of 1929 and Act V of 1930)

Preamble

Ques. State the scope of the Transfer of Property Act. Is it a complete code ?

Ans.:—Scope of Act. The transfer of Property Act, as its preamble shows, is not intended to be exhaustive of the law relating to transfer. The T. P. Act was passed with a view “to define and amend certain parts of the law relating to the transfer of property by act of parties.” The scope of the Act is thus strictly confined to transfer of property by act of parties inter vivos i. e. voluntary transfers between living persons. The ‘law of transfer,’ (1) by operation of law, e. g. in case of insolvency, forfeiture or sale in execution of a decree etc. save as provided by sec. 57 and chapter IV of this Act; or (2) relating to devolution of property after death e. g. by will is not covered by this Act.

The chief objects of the T. P. Act are two: first to furnish the complement to the law of intestate and testamentary succession by harmonising the rules which regulate the transfer of property between living persons with the rules affecting its devolution after death; and

secondly to complete the code of contract law, so far as it relates to immoveable property.

Like the Contract Act, the transfer of Property Act is not exhaustive, it does not profess to be a complete code. Thus, for instance, it is not exhaustive on the law of mortgages. It does not apply to a transfer of property by an award. It does not also apply to creation of easements. So where a case is not contemplated by any of the provisions of this Act, the High Court as a Court of Equity is entitled to administer the principles of equity as laid down in decided cases which are not distinctly prohibited by statute— *Mayashankar v. Burjorji*, 27 Bom. L. R 1449.

Chapter I

Preliminary

Ques. What is the territorial extent of the Transfer of Property Act ?

Ans:—Extent. The T P Act came into force on the first day of July 1882. It was then intended to extend, to the whole of British India except Bombay, the Punjab and British Burma. But since 1st January 1893, it has been extended to the Bombay Presidency and to the area included within the limits of Rangoon town and within the Municipalities of Moulmein, Bassein and Akyab. From 1st January 1922, this Act has been extended to the whole of Burma, excepting certain areas. This act has been extended to Berar from 1907. The T. P. Act is not still in force in the Punjab, although the equitable principles contained in the T. P. Act are some-times

followed by Punjab Courts. The T. P. Act does not apply to Delhi. It cannot be said to have automatically come into force in Delhi in 1912, when Delhi was constituted a separate province, in the absence of any notification to that effect *Ralli Brothers v Punjab National Bank*, A. I R 1930, Lah. 920.

Ques. Discuss whether the provisions of the T. P. Act affect (i) any right, liability or relief in respect of any legal relation constituted before the Act came into force and (ii) the procedure for obtaining such relief. (Cal. 1923, 25, 33.)

Ans:—(i) Clause (c) of sec. 2 lays down that "nothing herein contained shall be deemed to affect—any right or liability arising out of legal relation constituted before this Act came into force, or any relief in respect of any such right or liability." This clause embodies the general principle that Acts are prospective and not retrospective in their operation. Thus, for instance, the provisions of the T. P. Act regarding mortgages (S 59 attestation) or tenancy do not apply to a mortgage or tenancy created before the passing of this Act (ii) But there is a clear distinction between 'relief' and the mode or procedure for obtaining such relief and the T. P. Act, though it does not touch the substantive right to get a particular relief, does not spare the procedure whereby the relief is secured. Clause (c) of Sec. 2 preserves the rights of the parties constituted before the commencement of the Act, but after the introduction of this Act the procedure for enforcing those rights is governed by its provisions. It is however not the intention of the T. P. Act to render ineffectual any suit commenced and decree made under the procedure in force before this Act was passed.

Sec. 63 of T. P. Amendment Act of 1929 which came in force on 1st April 1930 also lays down that the Amendments have no retrospective effect.

Ques. Explain the terms “immoveable property” and “attached to the earth.” (Mad. 1902).

Ans.:—The term immoveable property is not defined in the T P. Act. It simply lays down that “immoveable property does not include standing timber, growing crops or grass.” The term is defined in Sec. 3 of the Indian Registration Act as “Immoveable property includes lands, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefits to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth but not standing timber, growing crops, nor grass”

The following are immoveable property :—

- (a) The ‘equity of redemption’ in mortgaged property.
- (b) A Hindu widow’s life-interest in the income of her husband’s immoveable property.
- (c) Office of hereditary priest of a temple.
- (d) Mortgage-debt is immoveable property even though the debt is secured by an equitable mortgage.
- (e) A *hat* (Market).
- (f) *Factory—Amratlal v. Keshavlal* 28 Bom. L. R. 959.

The following are not immoveable property —

- (a) A decree for sale of immoveable property on a mortgage
- (b) G. P. Notes.
- (c) A right of worship (d) Royalty.
- (e) Standing timber. A standing timber is a tree which is fit to be used in building and repairing houses; trees which bear fruit or other forest produce are not standing timber but are considered as immoveable property.
- (f) A machinery which is not permanently attached to the earth and which can be removed from one place to another.
- (g) A right to recover maintenance allowance (even though it is charged on immoveable property) is not in itself immoveable property.
A. I R. 1929, All. 281.

Attached to the earth:—means (a) rooted in the earth as in the case of trees and shrubs; (b) imbedded in the earth, as in the case of walls; or buildings or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached, such as doors and windows, which are called fixtures

Ques. How is the term “attested” now defined by the amending Acts of 1926 and 1927. What difference has it made in the law in regard to attestation? (Cal. 1929, 32; All. 1927).

Ans:—Attestation. The following definition has newly been added by the T. P. Amendment Act XXVII of 1926 as amended by Act X of 1927. “Attested,” in relation to an instrument, means and must be deemed

always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation is necessary,"

Attestation of signature is not necessary. Prior to this definition it was held by the High Courts as well by the Privy Council that it was necessary, to validate a mortgage under sec. 59 of the T. P. Act, that the mortgagor must sign the document in the presence of the attesting witnesses. A mere acknowledgment of his signature by the executant in the presence of the witnesses was not sufficient. *Shamu Pattar v. Abdul Kadir* 31 Mad. 215 affirmed by the Privy Council in 35 Mad 607. In the face of the new definition these decisions are no longer of any authority.

The new definition of attestation is retrospective in its operation. So all documents executed even prior to the passing of the Act XXVII of 1917, in which the attesting witnesses did not actually see the executant sign the mortgage-deed but received from the executant a personal acknowledgment of his signature on the deed, and then attested the deed, must be nevertheless deemed to have been validly attested. *Motilal v. Kasambhai* 29 Bom. L. R. 1334.

Ques. What is an actionable claim? (Mad. 1925, Cal. 1918, 20, 21, 22, 24, Bom. 1926, 32.)

Ans.—Actionable claim “Actionable claim means a claim (i) to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or (ii) to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Court recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent”

The following are actionable claims—

- (a) Claim for arrears of rent—*Sheo Goud v Gouri* 4 Pat 43.
- (b) The vendor's right to receive the purchase money after he has completed the sale. 3 All 12.
- (c) A share in partnership
- (d) A claim for rent to fall due in future because it is an accruing debt
- (e) A claim to unpaid dower debt—*Amir Hasan v, Muhamad Nazir* A. I R. 1932, All. 345.

The following are not actionable claims:—

- (a) A decree is not an actionable claim. A debt is an actionable claim but a debt which has already passed into a decree is not so—*Dagdu v Vanji* 24 Bom. 502, 12 Cal. 610.
- (b) The right of a person to recover damages for breach of a contract is merely a right to sue *Hirachand v Nemchand* 47 Bom. 719; A. I. R. 1933, All 642.
- (c) Debts secured by mortgage of immoveable property or hypothecation of moveable property.

- (d) A claim to mesne profits is not an actionable claim but a mere right to sue and therefore cannot be transferred. 3 Pat 575.
- (e) An uncertain sum cannot be included in the word 'debt' and therefore a claim to it is not an actionable claim.

Ques. Define "Notice." (Cal. 1928, 30, 31; All. 1925.)

*Ans:—*Notice. 'A person is said to have "notice" of a fact when he actually knows that fact, as when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it'

Explanation I to the above definition states that Registration is notice.

Explanation II states that *actual* possession is notice.

Explanation III states that notice to an agent is notice to the principal

Ques. Distinguish between 'actual notice' and 'Constructive notice.' (Cal. 1925, 32.)

*Ans:—*The T. P. Act contemplates three kinds of notice, namely, (1) actual notice; (2) constructive notice; and (3) notice to agent.

An actual notice. A person is said to have actual notice of a fact when he *actually knows* it. An actual notice, to constitute a binding notice, must be *definite* information given by a person *interested* in the thing in respect of which the notice is issued, and it must be given in the *same* transaction

Constructive notice. A person is said to have constructive notice of a fact when but for (i) wilful absten-

tion from inquiry or search or (ii) gross negligence, he would have known it. Thus, (1) a person refusing a registered letter sent by post must be deemed to have constructive notice of it, and he cannot afterwards plead ignorance of its contents, because he had wilfully abstained from receiving it and acquainting himself with its contents. *Jogendra v Dwarka* 15 Cal. 681

(2) A prudent purchaser should not rest content with merely seeing a mutation entry, if it does not cover the whole of the land he is purchasing. He ought to ascertain what are the entries in the Record-of-Rights and whether the vendor has got full proprietary right or mortgage right. If he fails to do so, there is a want of care or a wilful abstention from inquiry or search. *Harilal v. Mulchand* 30 Bom. L. R. 1149.

Ques. How far is Registration Notice?
(Cal. 1927, 31, 34. Bom. 1928)

Ans:—Formerly there was a conflict of decisions as to whether the registration of a document under the Indian Registration Act is of itself constructive notice of the transaction effected by the document. The Legislature has now interfered to set at rest this judicial conflict by making express provision that registration of an instrument relating to immoveable property amounts to notice of the instrument from the date of the registration. Vide Expl I to the definition of 'Notice' in Sec. 3. But in a case when the property is not all situated in one sub-district or when the registered instrument has been registered under sub-section (2) of Sec. 30 of I. R. Act from the earliest date on which any memorandum of such registered instrument has been filed by any Sub Registrar within whose sub-district any part of the property is situated. For registration to operate as notice three other requisites have to be fulfilled, viz. that (i) registration has

been effected or completed in accordance with the provisions of the Registration Act, (ii) necessary entries have been made in the books of the Registration office under Sec 51 of the Registration Act, (iii) the necessary indexes have been prepared under Sec. 55 of the Registration Act to facilitate search.

Registration is notice only where the transaction is required to be registered. In cases where registration is not compulsory but is only optional the mere fact of registration constitutes no notice. Registration is constructive notice of the registered document itself, but it cannot operate as notice of the unregistered instruments which are recited in the registered instrument and from which the holder of it derives his title. *Sharfuddin v. Govind* 27 Bom. 452.

Registration is a constructive notice to *subsequent* mortgagees or purchasers, but it cannot constitute notice to a *prior* mortgagee

Registration of a sub-mortgage does not amount to notice to the original mortgagor. Therefore where a mortgagor who had no actual notice of a registered sub-mortgage makes a payment in good faith to the mortgagee, the payment is not vitiated, notwithstanding the fact that such payment was made subsequent to the registration of the sub-mortgage. *Sahadev v. Shekh Papa Muya* 29 Bom. 199.

Ques. How far possession amounts to notice ? (Cal. 1933)

Ans —Possession amounts to notice:—Before the recent addition of Explanation II to the definition of notice, it was not clear how far possession is to be regarded as notice. In some cases it has been held that possession amounts to such notice of title as the person in possession may have (I. L. R. 25 All 366). In other cases

Courts have felt difficulty in expressing any opinion on the point. (I. L. R. 8 Cal 597) The newly added Expl. II provides that the person dealing with any immoveable property shall be deemed to have notice of the title of any person who, for the time being, is in actual possession thereof. The reason of the rule is that possession being *prima facie* evidence of title and also the only visible badge of ownership, a man in possession is entitled to impute knowledge of that possession to all who may have to deal with any interest in the property, and persons so dealing cannot be heard to deny notice of the title under which the possession is held and he can also be held bound by all the equities in favour of the person in possession. Possession to operate as notice must be actual possession and not merely of a *constructive* nature.

Ques How far is the knowledge of the agent knowledge of the principal? (Cal. 1932).

Ans.—**Notice to Agent.**—The general rule and the limitations to it are now embodied in Expl III to the definition of notice, which lays down that "A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material.

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognisant of the fraud."

To affect the principal with notice, five things are necessary:—(a) The agent must have received the notice during the agency; (b) The knowledge must come to him as agent; (c) It must be in the same transaction; (d) It must be material to the transaction; (e) It must not have been fraudulently withheld from the principal.

Knowledge of an agent acquired in a matter for which he was not agent, and in a transaction of a date before the agency commenced, cannot be imputed to the principal—*Chabildas v. Dayal Mowji* 31 Bom. 566 (P C)

Ques. What is the effect of the Amendment Act III of 1885 of Sec. 4 of T. P. Act ?

Ans —The second para of Sec. 4 of the T. P. Act e. g., “And sections 54, paragraphs 2 and 3, 59, 107, 123 shall be read as supplemental to the Indian Registration Act, 1908” has been added by the T. P. Amendment Act III of 1885. Before this para was added, a difficulty arose that while an unregistered sale-deed of property of less than Rs. 100 would convey a good title under the Registration Act, it would be wholly in-effective under the T. P. Act, unless it was accompanied by delivery of possession. This difficulty has now been removed and Sec 54 has been made supplemental to the Registration Act, the effect of the addition is that if a sale of immovable property is made by a written instrument, the instrument is compulsorily registrable, irrespective of the value of the property comprised therein—*Sohon Lal v. Mohan Lal* 50 All. 986 (F. B.)

Similarly—a lease for a period of less than a year, if made in writing, must be registered under Sec. 107 of the T. P. Act, though it is not compulsorily registrable under Sec. 17 of the Registration Act—*Rama Sahu v. Gowro*, 44 Mad. 55 (64) F. B.

Sec. 4 has nothing to do with charges, because a charge is outside the domain of the Registration Act, and is valid even though unregistered—*Manekchand v. Ganesh-lal* 35 Bom. L. R. 588.

Chapter II

Of Transfer of Property By Act of Parties.

Ques. Define "transfer of property". (Cal. 1925, 28, 29; All. 1927; Bom. 1927, 30.)

Ans.—"Transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to *himself*, or to himself and one or more other living persons: and "to transfer property" is to perform such act.

In this section 'living person' includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals,' (Sec 5)

Ques. What property may and **what property may not be transferred** under the T. P. Act? (Cal. 1929, 34; Bom. 1929, 30. Adv. 29, 30, 34.)

Ans.—"Property of *any kind* may be transferred except as otherwise provided by this Act, or by any other law for the time being in force".

Under the T. P. Act certain rights and interests, however cannot be transferred, and they are mentioned below.

(a) The *chance of an heir apparent* succeeding to an estate, the chance of a relation obtaining a legacy on the

death of a kinsman, or any other *mere possibility* of a like nature cannot be transferred.

(b) A *mere right of re-entry* for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An *easement* cannot be transferred apart from the dominant heritage

(d) An *interest in property restricted in its enjoyment* to the owner personally cannot be transferred.

(dd) A *right to future maintenance*, in whatsoever manner arising, secured or determined, cannot be transferred.

(e) A *mere right to sue* cannot be transferred.

(f) A *public office* cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) *Stipends* allowed to military, air force and civil pensioners of Government and *political pensions* cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby or (2) for an unlawful object or consideration within the meaning of sec. 23 of the I. C. Act 1872 or (3) to a person legally disqualified to be a transferee.

(i) A tenant having an untransferable right of occupancy, (2) the farmer of an estate in respect of which default has been made in paying revenue, or (3) the lessee of an estate under the management of a Court of Wards cannot assign his interest as such tenant, farmer or lessee. (Sec. 6).

Ques. Can a Hindu or a Mahomedan transfer property which is not in his possession?

Ans:—Under the Hindu Law the right of a presumptive reversionary heir or the bare chance of surviving another and succeeding to his inheritance is no more than a *spes successionis* or expectancy and cannot be transferred under clause (a) of Sec. 6 T. P. Act. A transfer by a Hindu of a reversionary interest is void. A reversioner cannot transfer his interest even in moveable property (e. g. promissory notes)—32 All. 88.

But a vested right, the right of enjoyment and possession being only postponed, can be transferred. 40 All. 692.

In Bengal and U. P. a member of a joint Hindu family other than the father cannot alienate his undivided share in ancestral estate held in coparcenary, on his own private account with the consent of his co-sharers. In Madras and Bombay he can transfer for value but not by way of gift.

Under the Mahomedan Law also, the transfer of expectancy is invalid. The chance of an heir apparent is nothing more than an expectancy which is neither transferable nor releasable under the Mahomedan Law—*Samsuddin V. Abdul* 31 Bom. 165. Even the relinquishment by an heir apparent of his right of inheritance is invalid.—*Asa Beev V. Karuppan* 41 Mad. 365.

Ques. What are the essentials of a valid transfer as regards the transferor, transferee and the property transferred. (Bom. 1925, 27).

Ans:—The essential of a valid transfer as regards the transferor, transferee and the property transferred are

shortly these (1) The transferor should be a person (the word 'person' includes a juridical person) *competent to contract* and the transferable property must belong to him, or at least, he must be authorised to dispose of property not his own (Sec. 7). (2) The transferee must be capable of holding property and must not be a person legally disqualified to receive a transfer (See Sec. 136 of this Act) A minor can be a valid transferee *Munskoer v Madan Gopal* 38 All 62 (3) The property, as well as the transferor and transferee must be in esse; (4) The property should be transferable under Sec. 6 of the T. P Act; (5) The necessary formalities (registration etc.) if prescribed must be gone through.

Ques. "The accessory follows the principal." Explain and illustrate the principle by reference to the ordinary operation of transfer under T. P. Act. (Cal. 1924, 25).

Ans —Operation of transfer. The maxim "the accessory follows the principal" signifies that when a man acquires a property he, by the very fact of his acquisition *ipse jure*, becomes the owner also of all that appertains to it as necessary. This principle is embodied and explained in Sec. 8 of the T. P. Act which states that "Unless a different intention is expressed or necessarily implied, a transfer of property passes forth-with to the transferee all the interest which the transferor is *then* capable of passing in the property, and *in the legal incidents thereof*."

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and where the property is machinery attached to the earth, the moveable parts thereof ;

and where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith ;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee). but not arrear of rent accrued before the transfer ;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect."

The object of this section is to cut down the length of deeds by doing away with the mention of the incidents of the property, which will be implied to be automatically conveyed by Sec. 8.

This section is inapplicable to transfers by execution sales. 39 Mad 283. But in a recent Allahabad case, the principle of this section, though not the section itself, has been applied to a Court sale. Thus, if the property is at the date of the auction sale subject to a charge, the purchaser takes it subject to the charge ; he is not clothed with a higher interest in it than what the transferor was capable of passing, *Nathamlal v. Durga Das* A. I. R. 1931, All. 62.

Ques. What transfers of property are expressly required to be made by writing and what are not so required ?

Ans.—Oral transfer—“A transfer of property may be made without writing in every case in which a writing is not expressly required by law” Sec. 9.

Where writing is not necessary:—Writing is not necessary in the following cases.

(1) A surrender of a lease is not a transfer and need not be in writing

(2) A transfer made in compromise of a claim is neither a gift nor a sale nor an exchange, so no writing is necessary.

(3) A partition of joint family property is not an exchange and is not by law required to be in writing—*Satya Kumar v. Satya Kripal* 10 C. L. J. 503.

(4) The creation of an easement is not a transfer thereof and therefore can be created by oral agreement.

(5) A transfer of land by a husband to be enjoyed by his wife during his life-time in discharge of future maintenance is not a gift or sale and may be made without writing—*Madan Pillai v. Badrakali*, 45 Mad 612 (F. B.).

Where writing is necessary:—Writing is necessary in the case of following instruments:—

- (a) Sale of immoveable property of the value of Rs. 100 or upwards—Sec. 54.
- (b) Sale of a reversion or other intangible thing—*Ibid.*
- (c) Simple mortgage irrespective of the amount secured—Sec. 59.
- (d) All other mortgages securing Rs. 100 or upwards—*Ibid.*
- (e) Leases of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent—Sec. 107.

- (f) Notice for the determination of leases—Sec. 106.
- (g) Exchange of immoveable property of the value of Rs 100 or upwards—Sec. 118.
- (h) Gift of immoveable property—Sec. 123.
- (i) Transfer of an actionable claim—Sec. 130.
- (j) Notice of transfer of actionable claim—Sec. 131

Ques. Point out in what cases are the conditions restraining the transferee of property from making any alienation valid and in what cases they are not valid. (Bom. 1926, 31.)

*Ans:—Conditions restraining alienation—*Sec. 10 of the T P. Act lays down that “where property is transferred subject to a condition or limitation, absolutely restraining the transferee or any person claiming under him from parting with, or disposing of his interest in the property, the condition or limitation is void.” The general rule in this Sec. that a condition in absolute restraint on alienation is void, is founded upon the principle of public policy allowing free circulation and disposition of property. A condition in restraint of alienation is a condition repugnant to the nature of the grant and, as such, inoperative.

Conditions which are void—Examples:—If A transfers his property to B and imposes a condition that B will not alienate it, the condition is void. Condition to sell the property at a fixed price or a condition restraining alienation of property except to a particular person or persons is void. A restriction in the power of alienation is void even though the restriction is contained in a compromise.

Conditions which are valid—Examples. There are two exceptions mentioned in Sec 10 to the above general rule viz. (1) in the case of a lease where the condition is for the benefit of the lessor, i. e. it must be supplemented by a clause that the “lessor shall have a right of re-entry in case of the lessee’s breach of the condition against alienation.” And (2) in the case of a married woman (not being a Hindu, Mahomedan or Budhist) property may be transferred subject to a restraint on alienation during her marriage.

Restraints on alienation imposed by *statute* are binding on all persons.

But although Sec. 10 renders void all conditions which absolutely restrain the transferee from disposing of the property—except in the above two cases—it is silent as to the validity of qualified restraints. A qualified restraint on alienation has therefore been held valid. A stipulation for preemption is held valid.

A general restriction on assignment does not apply to an assignment by operation of law, taking effect *in invitum*, as a sale under an execution

Ques. State in what cases are the conditions restraining a transferee of property from enjoying it in any manner he likes, valid and in what cases they are invalid.

*Ans:—*Sec 11 of the T. P. Act lays down that where, on a transfer of property, an interest therein is created *absolutely* in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.”

The principle of this section is that an interest created in favour of a person must be absolute, and that limitations directed against the *free enjoyment* of the property are void. The principle of this section applies as much to mortgages or leases as to gifts or sales, 8 All. 452.

Conditions which are not valid :—

- (a) Restraint on partition is void. *Mokoonda v. Gonesh* 1 Cal. 104.
- (b) Restraint on alienation for some period—*Chamara v. Sona* 14 C. L. J. 303.
- (c) Condition as regards residence—*Rukminibai v. Laxmibai* 44 Bom. 304.
- (d) A condition postponing enjoyment of the property is void—*Lloyd v. Webb* 24 Cal 44.
- (e) Restrictions contained in a decree.
- (f) Restriction as regards succession. A. I. R. 1931 P. C 179.

Conditions which are valid :—

- (1) Where a gift is made not of full proprietary rights but only of usufruct of land for the purposes of maintenance.—*Jugdēo v. Jwala Prasad* 15 O. C. 345.
- (2) A covenant not to use the house for any other purpose than a private residence was held to be not repugnant to the nature of the estate.

The second para of the sec. 11 also makes an exception to the above general rule in favour of the restriction imposed on the enjoyment of servient tenement for the benefit of the dominant tenement. Affirmative covenants are not by themselves invalid as between the transferor

and the transferee, negative or restrictive covenants only can be specifically enforced against a third person.

Ques. Examine the validity of the following disposition A transfers a property to B and provides that on B becoming an insolvent, the property shall revert to A.

Ans.—The disposition is void under Sec. 12 of the T. P. Act which lays down that “when property is transferred subject to a condition or limitation, making any interest therein reserved or given to or for the benefit of any person to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void. Nothing in this section applies to a condition in the lease for the benefit of the lessor or those claiming under him.” The section means that a condition attached to a grant that the grantee shall cease to have any right on becoming insolvent, or on attempting to alienate the property is void, and the grantee takes the entire estate as if that condition had not been attached. The reason is, that it is manifestly unjust that the grantee should enjoy and possess all the *indicia* of absolute dominion over the property, and yet be deprived of the right of alienation incident to such property; and it is equally unjust that creditors who may have made advances on the strength of the property should be deprived of its security on account of a clause in the transfer, which none but the grantor and grantee may know anything about.

Ques When does a transfer of property for the benefit of an unborn person take effect ? (Bom. 1927)

Ans.—Where, on a transfer of property, an interest therein is created for the benefit of a person not in exist-

ence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the *whole of the remaining interest* of the transferor in the property. (S. 13.)

Illustration:—A transfers property of which he is the owner, to B, in trust for A and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of A's eldest son does not take effect because it does not extend to the whole of A's remaining interest in the property.

The rule laid down in this sec is applicable to *moveable* as well as to *immoveable* property. (*Cowasji v. Rustomji* 20 Bom. 511).

A child en ventre sa mere is considered to be in existence.

✓ *Ques.* State and explain briefly “The rule against perpetuity.” (Cal. 1923, 27, 31 ; All. 1922, Bom. 1925, 32, 35)

Ans:—**Rule against perpetuity.**—The rule as contained in sec. 14 of T. P. Act runs thus—“No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.”

This sec. deals with what is termed “the doctrine of remoteness” or “the rule against perpetuity” and corresponds to sec. 114 of I. S. Act. It invalidates any transfer

which delays the vesting of the property beyond a life or lives in being and the *minority* of the donee, who must be living at the close of the last life. That is there must be *no interval* between the determination of the preceding interest and the vesting of the interest taken by the person who was not in existence at the date of transfer *except in the case of minority*. That property cannot be tied up longer than for a life in being and (twenty-one in England) eighteen years after. This is called the rule against perpetuity. The rule against perpetuity is founded upon consideration of public policy, namely, to prevent the mischief of making property inalienable. The rule is applicable both to Hindus and Mahomedans and relates to any property moveable or immoveable, but is inapplicable in the case of gifts to charities.

Ques. "In determining whether a gift is good or bad according to the Law of Perpetuity, regard is to be had to possible and not to actual events." Explain with illustration.

*Ans:—*Where a gift is affected with the vice of its *possibly* exceeding the prescribed limits, it is at once and altogether void. And even if in its actual event it should fall within such limits, yet it is still absolutely void as if the event which would have taken it beyond the limit have occurred. In determining whether a gift is good or bad the test is not that the gift has actually vested within the prescribed limits but that there was no possibility of its having been postponed beyond the limits. If therefore there was a possibility, the gift is bad even if in actual event it vests within the prescribed limits. For example, a devise is made to A (a bachelor) for life and then to his wife for life and the remainder to other persons; the gift is invalid, because it is *possible* that A should marry a

wife who was not born at the testator's death, that is, it is possible that an unborn person will take a mere life interest and not *all that remains*, this mere possibility will vitiate the whole device though in actuality in the particular case A's wife may not be an unborn person at the testator's death,—*Nabin Chandra v. Rajani* 25 C. W. N. 901.

Ques. Mention the exceptions to the Rule against Perpetuity if there be any. (Cal. 1916, Bom. 1935 Adv. 1929).

Ans:—The following are the exceptions to the Rule against Perpetuity :—

- (1) Vested interests are not affected by the rule, for when an interest has once vested, it cannot be bad for remoteness.
- (2) The rule has no application where land is purchased or property is held by a Corporation.
- (3) Gifts to charities do not fall within the rule, Sec. 18.
- (4) Property settled upon individuals for memorable public services may be by express legislation exempted from the operation of this rule.
- (5) The rule against perpetuity applies when an *interest in property* is created, and has no application to *personal contracts*.
- (6) Covenant of redemption in a mortgage does not offend the rule,—*Padmanabha v. Sitaram* 54 M. L. J. 96.*
- (7) The rule does not apply to contracts for perpetual renewal of leases.
- (8) The rule does not apply where only a *charge* is created which does not amount to *transfer* of any interest. *Mathub Hasan v. Kalawati* A. I. R. 1933 All. 934.

Ques. What are the conditions under which a property may be validly transferred to an unborn person ?

Ans.:—When an interest in property is sought to be created for the benefit of an unborn person, the following conditions embodied in Sec 13 and 14 must be fulfilled.

- (1) That the unborn person must be given the whole of the remaining interest, whatever intermediate interests may be created in favour of living persons. (Sec. 13.)
- (2) That the vesting of the property transferred is not delayed beyond a life or lives in being at the date of transfer and the minority of that unborn person ; and
- (3) That the unborn person must come into existence on or before the close of the last life named by the transferor.

Ques. State the rule enacted in the T. P. Act regarding an interest created for the benefit of a class of persons with regard to some of whom it fails by reason of remoteness.

What is the reason of the amendment of Sec. 15 made by Sec. 9 of the T. P. Amendment Act, (XX of 1929) ?

Ans.:—**Transfer to a class.**—The rule is enacted in Sec. 15 of the T. P. Act and may be stated thus “ If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails *in regard to those persons only and not in regard to the whole class.*”

For the words "as regards the whole class," of the old sec. the following words have now been substituted "in regard to those persons only and not in regard to the whole class." The principle of the old section was that a gift to a class which was void as to any member of that class by reason of being too remote, must fail altogether. The rule in *Leake v. Robinson*, on which the old section was based, has except in a few early Calcutta cases, never been followed in India.

Prior to certain special Acts, Hindu Law did not permit a gift in favour of a person who was not in existence at the date of the gift, or a bequest in favour of a person who was not in existence at the death of the testator.—*Tagore v. Tagore*,—on the ground that a person capable of taking must be in existence at the material date. To remove this disability three Acts were passed, namely, (1) Madras Hindu Transfers and Bequests Act I of 1914, (2) The Hindu Disposition of Property Act, XV of 1916, and (3) Hindu Transfers and Bequests (City of Madras) Act VIII of 1921. It is declared by all the three Acts that a transfer *inter vivos* or disposition by will of any property shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of transfer or the death of the testator as the case may be; and Secs. 13 and 14 of the T. P. Act and Secs. 100 and 101 (now 113 and 114) of the Indian Succession Act were applied to gifts and bequests to unborn persons.

The important consequence of the above Acts is that before the passing of the three Acts an unborn person could not take at all, but a bequest did not fail in its entirety but enured for the benefit of those who were in existence at the death of the testator [*Rai Bishen Chand v. Msmt Asmarda Koer*, also *Bhagbat v. Kalicharan*.] Since the enactment of the three Acts, an unborn person can

take, but a bequest which offends the rule against perpetuity renders the bequest void in regard to the whole class (vide old sec. 15)—(1925) 48 Mad. 906 (P. C.) Thus, while before the three Acts were passed a bequest to a class of persons some of whom were not in existence at the death of the testator did not fail in regard to the whole class, these Acts have brought about a result which it is conceived, was hardly contemplated when these Acts were passed.

In view of what is stated above the amendment has been made in sec. 15 of the T. P. Act.

Ques. X makes a gift in favour of A for life, afterwards to A's eldest son (unborn) for life and then to B, a person in existence at the time of transfer. Is the transfer to B valid? Give reasons.

*Ans:—*Here as the prior gift to A's eldest son fails by reason of Sec. 13 which prohibits the grant of mere life-interest to unborn persons, the gift over to B also fails as per Sec. 16 which states that "where by reason of any of the rules contained in section 13, 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails."

Ques. How long can the income of any property transferred be directed to be accumulated so as to prevent its being received and enjoyed by the transferee? When is accumulation permitted?

Ans:—Direction for accumulation —By the T P. Amendment Act of 1929 the old Section 18 (Accumulation) has been numbered as Sec. 17 with substantial amendments. The spirit of the old section was to discourage accumulation only making a small concession in its favour which was to last only for a period of *one* year from the date of the transfer. The legislature has now allowed accumulation (i) during the life-time of the transferor, or (ii) for a period of *eighteen* years from the date of transfer, and where a direction for accumulation exceeds the longer of the above two periods it will not be altogether void, but will fail only in respect of the excess period.

Subsection (2) of the new Sec. 17 now altogether abolishes the restriction against accumulation for the purpose of (a) the payments of the debts of the transferor or transferee, or (b) the provisions of portions for children or remoter issue of the transferor, or transferee or (c) for the preservation or maintenance of the property transferred.

Ques. Does the rule against perpetuity apply to transfer in perpetuity for the benefit of the public?

Ans:—Transfer for benefit of public—Section 18 lays down that “the restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.”

In India a direction for accumulation has been held valid in the case of Hindu and Mahomedan religious endowments though it infringed the rule against perpetui-

ties so the words "and 17" have been now added in Sec. 18 thus, a permanent transfer may be made in the following cases:—

- (1) *Wakf* such as for burning lamps in mosque or reading koran in public places—33 All. 400.
- (2) A gift for *Sadavart* or for building a well—14 Bom. 1
- (3) Gift for maintaining universities or schools of learning—31 Cal. 166.

But in the following cases the gifts have been held to be not religious or charitable. e. g.

- (1) a gift for the performance of ceremonies for the spiritual good of the donor or his family
Lmji v. Bapuji 11 Bom. 441.
- (2) A gift for the repair of a private tomb or monument.
- (3) A bequest to a "dharma" was held void as the word 'dharma' was too vague and indefinite for the Court to enforce the gift—*Runchordas v. Parvati*, 23 Bom. 725 (P. C).

Ques. Define "Vested interest" and "Contingent interest." Explain, giving illustrations, the difference under the T. P. Act between (1) a vested interest and a contingent interest. (Bom. 1924, 26, 33 Adv. 1234.)

*Ans:—*Where on a transfer of property an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take forth-with, or on the happening of an event which must happen, such interest is vested. (S. 19)

If ~~such~~ interest is to take effect forth-with it is said to be **vested in possession**, but if it is to take effect not forth-with but on the happening of an event which must happen, it is said to be **vested but not in possession** (S. 19). Where on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a **contingent interest** in the property, (S. 21)

The chief points of difference between the two kinds of interests are —

- (1) A *vested interest* does not depend upon the fulfilment of a condition; it creates a present and immediate right though the enjoyment may be postponed to a future date. It may therefore be vested in possession or vested yet not in possession. But a *contingent interest* is solely dependant upon the fulfilment of a condition, so that in case of non-fulfilment of the condition the interest may fall through.
- (2) A *vested interest* is not defeated by the death of the transferee before obtaining possession, it will pass on to his heirs. While a *contingent interest* fails in such a case and the property then reverts to the transferor.
- (3) A *vested interest* is transferable as well as heritable; but a *contingent interest* is not so as it is a mere chance.

To illustrate their difference let us suppose A makes a gift to B. If A delivers the property to B at the time the gift is made, the interest created in favour of B is said to be *vested* because the interest created in his favour is vested at the moment of the transfer. But if A declares

in his deed of gift that B is to get the property at his marriage, B's marriage is a future event which may or may not happen, such an interest the vesting of which depends on the happening or non-happening of a contingent future event is a *contingent interest*. A *contingent interest* becomes *vested* when the condition that gives it the contingent character is fulfilled; or in other words, when the contingency happens or its happening becomes impossible, as the case may be.

Ques. When does an unborn person acquire vested interest? (Bom. 1927)

Ans.:—"Where on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his *birth*, unless a contrary intention appear from the terms of the transfer, a *vested interest* although he may not be entitled to the enjoyment thereof immediately on his birth " (Sec. 20)

Ques. State the principles governing conditional transfers of property. Distinguish between condition precedent and condition subsequent. (Bom. 1927)

Ans —When an interest is created on a transfer of property and is made to depend on a condition, the transfer is said to be a *conditional transfer*. When the interest is made to accrue on the fulfilment of the contingency, the condition is said to be a **condition precedent**; but if it is provided that the interest already created is to cease to exist or is to pass on to another on the happening of the condition superadded, it is called a **condition subsequent**. So there are two kinds of conditional transfers: (1) In one the condition on which the transfer depends is a condition precedent; (2) In the other, it is a condition subsequent.

The points of distinction between the two are.—

- (1) A condition precedent is one which must happen before the estate can commence. A condition subsequent is one by the happening of which an existing estate will be defeated.
- (2) Where the condition is precedent, the estate is not in the grantee until the condition is performed; but where the condition is subsequent, the estate immediately vests in the grantee and remains in him till the condition is broken.
- (3) In the case of a condition precedent being or becoming impossible to be performed or being immoral or opposed to public policy, the estate will not arise and the transfer will be void (Sec. 25) But in the case of an impossible or immoral condition subsequent, the estate will be or become absolute and the condition will be ignored. (Sec. 32).
- (4) A condition subsequent must be strictly fulfilled (Sec. 29) but a condition precedent is fulfilled if it is substantially complied with (Sec. 26)

Ques. Explain the doctrine of *Cypres* and the limitations to the same. (Mad. 1923, Cal. 1930 Adv. 1925, 28.)

*Ans :—*Doctrine of *Cypres*—Section 36 lays down the doctrine of *Cypres* with reference to the fulfilment of a condition precedent e g. that when there is a condition precedent to the accrual of an interest, the condition shall be deemed to have been fulfilled if it has been *substantial'y complied with*, i. e. where a literal execution of the intention of the transferor becomes inexpedient or impracticable the Court will execute it as nearly as it can according to the

original purpose or *Cypres*. Thus where the consent of several persons is necessary for the marriage of the transferee and some of the persons, become insane or die, the consent of the rest will do.

The doctrine of *Cypres* is inapplicable to condition subsequent, because a condition subsequent must be *strictly fulfilled* (sec. 29). Conditions subsequent that go in defeasance of a vested interest shall be taken strictly, for they are odious; and hence it is that unless they are strictly fulfilled the ulterior disposition cannot take effect.

Ques. State and explain the Doctrine of Acceleration as enunciated in the T. P. Act.

Ans:—Doctrine of Acceleration.—Section 27 enunciates the doctrine of acceleration thus “ where, on a transfer of property, an interest therein is created in favour of one person, and, by the same transaction, an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor. But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.” Thus, where there is a gift in remainder, expectant on the termination of an estate for life, and the prior life-estate becomes void, the gift does not fail but is accelerated—*Adjudha V. Rakhman* 10 Cal. 482 (P. C.) A device was made by X to his child *en ventre sa mere* (under the misapprehension that she was *enciente*), and if such child died before a certain age, then a gift to another; when it was found that the wife

was not *enciente*, the ulterior estate became accelerated and did not become void. *Jones V. Westcomb*. The rule in this section applies both to moveable and immoveable properties.

Ques. Explain the "Doctrine of Election."
(Bom. 1925, 26, 30 Adv. 1923, 33.)

*Ans — Doctrine of Election:—*Election is an obligation impliedly imposed on a party to choose between two inconsistent or alternative rights in a case where there is a clear intention of the grantor that the grantee should not enjoy both. The foundation of the doctrine of election is that the person taking a benefit under an instrument must also bear the burden. A person cannot take *under* and *against* one and the same instrument. Suppose A by will or deed gives to B a property belonging to C, and by the same instrument gives other property belonging himself to C. A Court of Equity will hold C entitled to the gift made to him by A only upon the implied condition of his (C's) conforming to all the provisions of the instrument by renouncing the right to his own property given in favour of B; he must consequently make his choice, or as it is technically termed "he is put to his election," to take *either under or against* the instrument. If he (C) elects to take under the instrument, he must relinquish in favour of B his property given to B by A, and take the property which is given to him by A. If however he (C) elects not to take according to the instrument, he must relinquish the benefit conferred upon him, and the benefit so relinquished shall revert to the transferor. But the disappointed donee (B) is entitled to take out of the benefit the value of the property attempted to be transferred to him.

This doctrine of election is enunciated in Sec. 35 of the T. P. Act. But there is a distinction between the English

and Indian Law as to the disposal of the balance after satisfying the donee. Under the English Law the balance goes to the refractory donee; whereas under the Indian Law the balance goes to the transferor or his representatives. In other words *compensation* and not *forfeiture* is the principle on which the doctrine of election proceeds under English Law. Secondly, under the Indian Law the compensation to be paid to the disappointed transferee is a charge upon the transferor or his representatives; but under English Law, the compensation to be given to transferee is a charge upon the refractory donee.

Ques. State the principle of 'Election' as laid down in the T. P. Act. Illustrate your answer by an example.

Ans.—The principle of 'Election' as laid down in Sec. 35 of the T. P. Act, may be stated thus—"Where a person professes to transfer property which he has no right to transfer, and, as part of the same transaction, confers any benefit on the owner of the property, such owner must elect either to confirm such transfer, or to dissent from it, and, in the latter case, he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him "

Illustration —

The farm of Sultanpur is the property of C, and worth Rs 800. A by an instrument of gift, professes to transfer it to B, giving by the same instrument Rs. 1000 to C. C. elects to retain the farm. He forfeits the gift of Rs. 1000.

In the same case, A dies before the election. His representatives must, out of the Rs. 1000, pay Rs. 800 to B.

Ques. In what cases is a person put to election under the T. P. Act ? (Bom. 1927).

*Ans:—*In the following cases a person is put to election as mentioned in Sec. 35 of the T. P. Act.

- (1) Occasion for election arises where a person professes to transfer property which he has no right to transfer and, as part of the same transaction confers some other benefit on the owner of the property.
- (i) In order to raise a case of election it is necessary that the intention of the testator to dispose of the property which is not his own must be clear.
- (ii) No case for election arises where the two gifts are made in the *same transaction*.
- (2) A case for election arises whether the transferor does or does not believe that which he professes to transfer to be his own.
- (3) No case for election arises when a benefit is given *indirectly*.
- (4) A person who, in his one capacity, takes a benefit under the transaction, may, in another, dissent therefrom.

Exception to the four preceding rules—Elector owner is to relinquish only that benefit which is in lieu of his property and no other.

- (5) *Acceptance of the benefit* by the donee will amount to election if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.
- (6) Such knowledge or waiver will be presumed if the donee *enjoys* the benefit for *two years* without dissenting.
- (7) Such knowledge or waiver may be inferred when by the act of the donee the parties cannot be placed status quo.
- (8) If the donee fails to signify *within one year* after the transfer his intention to confirm or dissent from it, the transferor or his representatives may after that period require him to make his election, and if he does not comply with this requisition he will be deemed to have elected to confirm the transfer.
- (9) In cases of *disability*, the election shall be postponed until the disability ceases or until the election is made by some competent authority.

Ques. Explain the principle of “Apportionment.”

Ans.—**Apportionment**.—The expression ‘apportionment’ is used in two senses—(1) to denote distribution of a common fund among several claimants; and (2) to denote the contribution made by several persons having

distinct rights to discharge a common burden. It is in the first sense that the word is used in section 36 of the T. P. Act. The principle of 'apportionment' as embodied in Sec. 36 may be stated thus—"In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends, and other periodical payments in the nature of income, shall upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and be apportionable accordingly, but to be payable on the days appointed for the payment thereof."

Thus, where a transfer of property took place on the 24th Falgoon 1922, the transferee would be entitled to the rents accruing *after* and *not before*, that date, although the rents from Magh to 24th Falgoon, being included in the Chait Kist, would be payable in Chait. The Chait Kist must be deemed to accrue and to be apportionable accordingly—3 Pat. 367.

Transfer of Immoveable Property.

Ques. Where a third person (i. e. other than the transferor or transferee) has a right to receive maintenance or a provision for advancement or marriage from the profits of immoveable property transferred, under what circumstances and upon what conditions can such right be enforced against the transferee?

*Ans:—*The old Section 39 provided that such right can be enforced against a transferee of the property where (1) the transfer had been made with the *intention of defeating* the right, and (2) the transferee had *notice of the intention* or (3) the transfer was gratuitous.

Under the present section as amended, such right can be enforced against the transferee (1) if the transferee has notice of the right of maintenance, or (2) if the transfer is gratuitous. It is now immaterial whether the transferor has any fraudulent intention, and whether the transferee has notice of such intention.

The right cannot be enforced against a transferee for consideration and without notice of the right, nor against such property in his hand.

In order to apply this section the maintenance etc should run with the property i. e. it should have been fixed and charged upon the estate by a decree or by an agreement; the leading cases are—*Ram Kunwar v. Ram Das* 22 All. 326; *Lakshaman v Satyabhamabai* 2 Bom. 494.

Ques When is a covenant said to “run with the land” and when merely “relate to the land”? Point out the distinction between them giving illustrations. Against whom can they be enforced? (Bom. 1929).

Ans :—Section 40 of the T. P. Act states that “Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or,

Where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon.

Such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee

of the property affected thereby but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands."

The first para of the section deals with what are called restrictive covenants which are enforced in equity in England on the ground that the person entitled to the right has an equitable interest in the land or a right in the nature of an equitable easement—*Basdeo v. Jhagru* 46 All. 333. A 'covenant which runs with the land is a restrictive covenant because it is something which restricts the user of the land. A positive covenant never runs with the land either in law or in equity—Thus,

If there is a restrictive covenant and the purchaser takes with notice of it, the person in whose favour the covenant is made can restrain the purchaser from acting contrary thereto—*Mohini Mohan v. Ramdas* 28 C. W. N. 271,

The second para of the Section deals with rights which arise out of a contract between the person entitled to the rights and the owner of the property transferred i. e. with contractual obligations relating to land but falling far short of any interest therein.

Thus, A contracts to sell Sultanpur to B. While the contract is still in force, he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

The third para states against whom can these rights be enforced.

The T.P. Act does not deal with such covenants which run with the land as are dealt with in the English Law e.g. which bind the third party irrespective of notice.

Ques. State the nature and characteristics of the covenants which run with the land. (Cal. 1923, 24)

Ans—Covenants running with the land. “A covenant is said to run with the land, when either the liability to perform it or the right to take advantage of it passes to the assignee of land”. For example, a covenant in a lease for renewal there of one running with the land and may be enforced against all transferees. Similarly, a covenant for title runs with the land.

Covenants running with the land are different from (i) the restrictive covenants (contemplated in Sec. 40) which bind only transferees with notice and gratuitous transferees, and from (ii) the covenants in the nature of easements which prevail against the whole world irrespective of notice. A covenant running with the land though wider in its application is not altogether exempt from the equitable rule as to notice. When a restrictive covenant is so fastened to a piece of land that it may be said to have inhered in it, a presumption may arise that it runs with the land and passes by an assignment of the land. This presumption though rebuttable is not defeated by the plea of purchaser's ignorance. The T. P. Act does not deal with these running covenants which are so very common in the English law.

Ques. Under what circumstances is a transfer by an ostensible owner of immoveable property binding upon the real owner? (Cal. 1926, 32, 33. All. 1921. Bom. 1925, 27.)

Ans:—Transfer by an ostensible owner:—The law, on this point is laid down in Sec. 41 of T. P. Act thus—“Where, with the consent, express or implied of the person

interested in immoveable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. "

This section deals with a transfer by an ostensible owner, who appears to be a full and unqualified owner of the property, but in reality has only a qualified possession. The rule in this section is based upon the doctrine of estoppel clearly recognised for the first time in *Ram-Coomar v. Mc. Queen* 11 B. L. R. 46 and forms an exception to the general rule that no one can convey a better title than he himself has in the property.

The circumstances under which the transfer by an ostensible owner is binding upon the real owner are therefore four—(1) the transferor is to be the ostensible owner of the property with the consent express or implied of the persons really interested in the immoveable property; (2) the transfer is made for valuable consideration; (3) the transferee has acted in good faith; and (4) that the transferee has made reasonable inquiries to ascertain that the transferor had power to make the transfer. Where any one of these essential elements are wanting the transferee is not entitled to the protection afforded by this section. Benami transactions afford the best illustrations of this section.

Ques. What are the rights of a transferee where the transferor has no interest in the property conveyed but subsequent to the transfer acquires an interest equal to or less than the interest conveyed? (Cal. 1925, 33).

Ans:—Transfer by unauthorised person. Section 43 lays down that “where a person *fraudulently* or *erroneously* represents that he is authorised to transfer certain immoveable property, and professes to transfer such property *for consideration*, such transfer shall, at the option of the transferee, operate on *any interest* which the transferor may acquire in such property, at any time during which the contract of transfer subsists.

Nothing in this section shall impair the rights of transferees in good faith for consideration without notice of the existence of the said option.”

The principle of this section is that if a man sells an estate to which he has no title, and after the conveyance acquires the title, he will be compelled to convey it to the purchaser.

If the representation is neither erroneous nor fraudulent i. e. if the truth is known to both the parties, this section has no application. *Rashmon. V Surya Kantha*, 32 Cal. 382.

The principle of this section applies to a transfer by way of lease, sale, mortgage or exchange; and it also applies to Hindu as well as to Mahomedan conveyances. But the rule has no application to a case of a compulsory sale i. e. a sale in execution of a decree. This section does not apply where there is statutory prohibition to transfer the property on grounds of public policy, *Sannamma V. Radhabhaji*, 41 Mad. 418 (F. B.)

The transferee's right endures only during the time the contract subsists. If, therefore, in case of a sale the purchaser has repudiated the transaction and recovered the purchase money, the relation of transferor and transferee has ceased to exist, and the contract is no longer subsisting. In such a case no claim in respect of property

acquired subsequent to the cessation of the contract can be made by the transferee.

Ques. What is the principle which is sometimes referred to as “feeding the grant by estoppel”? Discuss its applicability in the case of a transfer of the interest of a Hindu reversioner expectant on the death of a qualified owner. (Cal. 1927, 34 Adv. 1931).

Ans.—Feeding the estoppel.—The principle enunciated in Sec. 43 T. P. Act, is that if a person sells an estate to which he has no title and after the conveyance acquires a title, he will in equity be compelled to convey it to the purchaser, because as between the transferor and the transferee, the transferor cannot plead a subsequent title to the estate. This section is based on the doctrine that a subsequently acquired interest *feeds the estoppel*. When a grantor by a recital is shown to have stated that he is seized of a specific estate, and the Court finds that the parties proceeded upon the assumption that such an estate was to pass, an estate by estoppel is created between the parties in respect of any after-acquired interest of the grantor, and the newly acquired title is said to ‘feed the estoppel.’ *Krishna Chandra v. Rasik Lal* 21 C. W. N. 218.

The principle of Sec. 43 has no application where there is a statutory prohibition to transfer the property. In the present case the expectant interest of a Hindu reversioner being a mere *spes successionis* and as such inalienable under sec. 6 (a) of the T. P. Act, the transfer is inoperative. *Anand Mohan v. Gour Mohan* 48 Cal. 536.

Ques. What is the legal effect of a transfer by a co-owner of his share in immoveable property. (Bom. 1927)

Ans:—Transfer by one co-owner :—Where one co-owner of immoveable property transfers his share, the transferee acquires as to that share (1) the right of joint possession, or (2) the right to partition to the extent enjoyed by the transferor. This would apply to transferee of all kinds, including mortgagees and lessees.

But where the transferee of a dwelling house belonging to an undivided family (Hindu or Mahomedan) is not a member of the family, he is not entitled to joint possession or other common or part enjoyment of the house. This principle is deducible from the judgment of Westrop C. J —“ We deem it a far safer practice and less likely to lead to serious breaches of peace, to leave a purchaser to a suit for partition, than to place him by force in joint possession with the members of a Hindu family, who may be not only of a different caste from his own, but also different in race and religion.”—*Balaji v. Ganesh* 5 Bom. 499, (504).

Ques. State the rule laid down in the T. P. Act regarding priority of rights created by transfers at different times.

Ans :—Priority of rights created by transfer :—The rule as embodied in Sec. 48 runs thus—“ Where a person purports to create by transfer at different times rights in and over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later-created right shall, in the absence of a special contract of reservation binding the earlier transferees, be subject to the rights previously created.”

This section is a statement of the rule expressed in the maxim *Qui prior est tempore potior est jure* (he who is prior in time is better in law).

This section applies where there are completed valid transfers, and there is a conflict between the two transfers. It therefore does not apply where the two interests do not conflict, namely, when a property is mortgaged to one and then sold to another, or where there is contract for sale and a completed sale.

Where both the transfers are registered it is the date of execution and not the date of registration that determines priority, and this priority is not influenced by the fact that the party having the later deed is in possession of the property—*Narayan v. Lakshuman* 29 Bom. 42.

Where two instruments are executed on the same day that which was executed first takes priority, but where it cannot be ascertained which security was executed first the mortgagees would take as joint tenants or tenants in common.

Exceptions to the rule that priority is determined by order of time.

- (1) When a mortgage is executed by a Receiver under an order of Court directing that such mortgage should constitute a first charge, it takes priority over any other mortgage of earlier date. 34 Cal. 427.
- (2) Advances made to save the mortgaged property from loss or destruction i. e. *salvage lien*.
- (3) A crown debt comes over all other debts.
- (4) When the priority is barred by estoppel.

Ques. State the law relating to improvements made by bona-fide holders under defective title? (Bom. 1924).

*Ans:—*The law relating to improvements made on lands by bona-fide persons holding under defective titles is laid down in Sec. 51 of the T. P. Act thus—“When the *transferee* of immoveable property makes any improvement on the property, *believing in good faith that he is absolutely entitled thereto*, and he is subsequently *evicted* therefrom by any person having a better title, *the transferee has a right to require the person causing the eviction either (1) to have the value of the improvement estimated and paid or secured to the transferee, or (2) to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.*

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at *the time of eviction*.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is *entitled to such crops* and to free ingress and egress to gather and carry them.”

This section is based upon the principle that he who will have equity must do equity. In order to entitle a person to the benefit of this section (i. e. to the improvements made by him or to their value) three things are necessary.

Firstly, he must be a “transferee”—mere stranger or a trespasser is not entitled to the benefit of this section.

The word “transferee” does not include an auction purchaser of the property, in view of clause (d) of Sec. 2—*Nannu Mal v. Ramchander* A. I. R. 1931 All. 277.

Secondly, he must believe himself to be absolutely entitled to the immoveable property. A person who is

aware of the imperfection of his title or who knows that his title is terminable some day or other, such as a lessee or a tenant or a mortgagee, is not entitled to the benefit of this section.

Thirdly, he must believe in 'good faith'—If a person has made improvements in good faith as a *bona fide* occupant of the land and in the belief that the land is his own, he may be entitled in equity to recover the value of the improvements—*Dharmadas v. Amulya* 33 Cal. 1119. A person in wrongful possession cannot recover the costs of improvement—*Murlidhar v. Parmanand* 34 Bom. L. R. 165.

This section applies to both Hindus and Mahomedans. It is inapplicable to a purchaser at a Court-sale. 36 Mad. 194. This section applies even though the transferor himself is the evictor.—*Harilal v. Gordham* 29 Bom. L. R. 1414.

Ques. State the **Doctrine of lis pendens** as embodied in the T. P. Act. (Bom. 1926, 32).

Ans—Section 52 of the T. P. Act deals with the doctrine of **lis pendens**. It is stated thus—"During the *pendency* in any Court having authority, or established beyond the limits of the British India by the Governor-General in Council, of any suit or proceeding *which is not collusive* and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint

or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

In view of the difficulties created by the use of the words 'active prosecution' and 'contentious' in the old section, the following amendments have been made by Amendment of 1929, the word 'pendency' is substituted for 'active prosecution' and the word 'contentious' is omitted and to make clear the meaning of the term *pendency* an explanation has been added. As a *collusive* suit is no real suit at all the words 'which is not collusive' have been inserted.

Ques. What is the principle on which the Doctrine of *Lis Pendens* is founded ?
(Cal. 1911, 17).

*Ans:—*The doctrine of *lis pendens* is based on the maxim *pendente lite nihil innovator* i. e. during a litigation nothing new should be introduced, the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. The principle of this doctrine will be found in the judgment of Lord Justice Turner in the leading case of *Bellamy v. Sabine*. "The doctrine of *lis pendens* is not founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this foundation, that it

would be plainly impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo* subject again to be defeated by the same course of proceedings" So we may say that the principle of *lis pendens* is not based on the doctrine of notice but on the doctrine of finality in litigation the judgment of a Court being binding not only on the litigating parties but on those who derive title from them *pendente lite* whether with notice or not:—*Krishnabai v. Savlaram* 51 Bom. 37. A purchase made of property actually in litigation, though for valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice.

Ques. What are the elements necessary to constitute *Lis-pendens* ? (Cal. 1915, 20).

Ans:—Essentials of Lis-pendens—In order to constitute a *lis pendens* the following elements must be present.

- (a) There must be pendency of a suit or proceeding.
- (b) The litigation must be pending in a competent Court.
- (c) The suit or proceeding must not be a collusive, one.
- (d) The suit or proceeding must be one in which a right to *immoveable property* is *directly* and *specifically* in question.

- (e) The property in dispute must be transferred or otherwise dealt with by any party to the litigation.
- (f) The alienation must affect the rights of the other party.

Ques. Discuss the applicability of the doctrine of Lis-pendens. Do suits decreed *ex parte* and compromise decrees fall within the scope of the doctrine of Lis-pendens? (Bom. 1928.)

Ans.—The doctrine of Lis-pendens laid down in sec. 52 T. P. Act. applies to “any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question.” The words “contentious suit or proceeding” have now been replaced by the words “suit or proceeding which is not collusive.”

A collusive suit or proceeding is not a real proceeding but a mere pretence and a decision arrived at in such a proceeding is binding only on the parties and their privies but not others (transferees). A friendly suit stands on the same footing as a collusive suit, and the rule of *lis-pendens* does not apply. The doctrine of *lis-pendens* applies to administration suits, maintenance suits or partition suits only if in such a suit the right to immoveable property is directly and specifically in question i. e. where the right has been made a *charge* on it.

A suit for rent is not a ‘right to immoveable property and therefore the rule does not apply.—55 Cal. 701.

A suit for specific performance of a contract for sale or lease of immoveable property is a suit in which the

immoveable property is directly and specifically in question and the purchaser *pendete lite* is bound by the result of the suit.—*Bhaskar v Shankar* 26 Bom. L. R. 518.

The prohibition in this section is only against a suit which is collusive; there is nothing to prevent the doctrine from applying to a suit which is decreed *ex parte*, owing to non-appearance of the defendant. *Krishnappa V. Shivappa* 31 Bom. 393.

This section should be construed as applying to a suit originally contested but subsequently compromised provided that such compromise is not tainted by fraud or collusion. *Annamalai v. Malayandi* 29 Mad. 426 F. B.

The fact that a sum of money was paid by one party to induce the other party to agree to a compromise decree does not make the doctrine of *lis pendens* inapplicable—*Ramdulari v. Upendra* 4 Pat. 619.

If in a pending suit parties arrive at a compromise in which one party transfers all his rights to the other party, the compromise is not bad on the ground of *lis pendens*.—*Chhotabhai v. Dadabhai* 36 Bom. L. R. 738.

Ques. Does the doctrine of *Lis-pendens* apply to Court sales? (Bom. 1928, Adv. 1925)

Ans:—Reading the plain language of Sec. 52 T. P. Act with that of Sec. 2 (d) of the same Act it is quite clear that the legislature did not intend that any sale in execution of a decree or order of a Court of competent jurisdiction should be affected by the provisions of this section. But still it is now settled law that the doctrine of *lis-pendens* as laid down in Sec. 52 (though not the section itself) applies as well to *involuntary* as to voluntary transfers i. e. to execution and revenue sales and therefore a

purchaser of a property at an execution sale during the pendency of a suit in respect of the same property is affected by the doctrine of *lis-pendens*.—*Byramji v. Chumilat* 27 Bom. 26.

The doctrine of *lis-pendens* applies to a sale held by order of a Magistrate under Sec. 88 Cr. P. Code. So, where during the pendency of a suit in a Civil Court, the suit property was attached and sold by the Magistrate under Sec. 88 Cr. P. Code, and subsequently the Civil Court decreed the suit, held that the decree-holder could recover the property from the purchaser in the criminal proceeding. *Narayan V. Govind*, 31 Bom. L. R. 345.

Ques. Does the doctrine of *lis pendens* apply (a) to an involuntary sale; (b) to the proceedings in execution of a decree; (c) to a transfer by a person who subsequently to the transfer is added as a party to the leading suit (d) to a transfer after decree by the first Court but before appeal?

Ans.—(a) Yes, the *lis-pendens* applies. Thus where during the pendency of a mortgagee's suit for sale of the mortgaged property, a third person obtained a money decree against the mortgagor and had the mortgaged property sold, held that in the absence of fraud, the sale in execution under the money decree was a sale *pendente lite* as regards the mortgage suit, and as the auction purchaser bought only the equity of redemption, his title to the land would be subject to the rights of the mortgagee.—*Abdul Majid v Abdul Majid* 4 Bur. L. T. 44.

(b) Yes, the word 'rights' in Sec. 52 ("so as not to affect the rights of any other party") has reference not only to substantive rights but also to a matter of

procedure. Thus it includes a right to execute a decree—*Krishnabai v. Saralaram*, 51 Bom. 37, 29 Bom. L. R. 60.

The doctrine of *lis-pendens* applies to transfers made during the pendency or execution proceedings—*Harshankar v. Shw Govind* 26 Cal. 966. This is now made clear by the Explanation to the Section 52 which lays down that the pendency of a suit continues until the suit or proceeding has been disposed of by a *final* decree or order and *complete satisfaction* of the decree has been obtained.

(c) The doctrine of *lis-pendens* does not apply where the transfer was made, during the suit, by a person who was not a party to the suit *at the time* of the transfer but who was *subsequently* made a party. Thus, in 1910 V made a gift of his land to his daughter R. The plaintiff sued V in 1914 to recover possession of the land. V died pending the suit and R was brought on the record as V's legal representative. But before she was so brought on the record, she had sold the land to the defendants. The plaintiff thereupon sued the defendants to recover possession of the land from them on the ground that the sale was affected by the doctrine of *lis-pendens*. *Held* that R was not a party to the suit of 1914 in her own right and the sale to defendants took place before she was brought on the record, and therefore the doctrine of *lis-pendens* did not apply—*Bala Ramchandra V. Daulu* 27 Bom. L. R. 38.

(d) The doctrine of *lis-pendens* applies to an assignment made after the passing of the decree and before the filing of the appeal.—*Govindappa v. Hanumanthappa* 38 Mad. 36 (39). In such a case, the suit is regarded as pending till the decision of the Appellate Court.

Ques. Discuss briefly the Doctrine of *Lis Pendens*. (Bom. 1930, 34, Adv. 1928, Cal. 31, 32, 34. All. 23, 25).

Ans:—Doctrine of Lis Pendens. During the *pendency* in any Court of any suit or proceeding which is not *collusive* and in which any right to *immoveable* property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose. This is commonly known as the doctrine of *Lis Pendens* and is based on the maxim "*pendent lite nihil innovatur*," i. e. during litigation nothing new should be introduced. The real aim of this doctrine is to prevent multiplicity of suits. The pendency of a suit or proceeding commences from the presentation of the plaint or the institution of the proceedings and continues until there is a *final* decree and *complete satisfaction* of the decree has been obtained.

Ques. State and explain briefly the law laid down in the T. P. Act about fraudulent transfers. (Cal. 1911, 16).

Ans:—Fraudulent transfer. The law about fraudulent transfer as laid down after the amendment of 1929 may be stated thus—“(1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a *decree-holder* whether he has or has not applied for

execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

The first part of the section deals exclusively with transfers made with intent to defraud *creditors* and the second part with transfers made to defraud *subsequent transferees*.

The section is restricted to immoveable property and has no application to moveables. The benefit of this section is not restricted to existing creditors alone but it extends to subsequent creditors as well. This section does not render a transaction *void ab initio*, but only voidable, and that only at the option of any person defeated, delayed or defrauded.

Para 4 of this section enacts that a suit instituted by a creditor to set aside a fraudulent transfer shall be instituted on behalf of all the creditors, it is competent for *one creditor* to sue but he must sue not in his individual capacity but in a representative capacity and the decree will enure to the benefit of all the creditors.

Ques. Under what circumstances is a transfer of immoveable property presumed to be fraudulent ? (Bom. 1924, 26).

Ans —Presumption of fraudulent intention. The second para of the old section 53 contained a rule of evidence, indicating the circumstances under which the fraudulent intention might be presumed, e. g. that when the effect or any transfer of immoveable property is to defeat or delay creditors, and the transfer is made gratuitously, or for a grossly inadequate consideration, the transfer may be presumed to have been made with intent to defeat or delay creditors. The words 'when the effect of any transfer is to defeat or delay creditors' have given rise to considerable difficulty. The second para of the old section has therefore been omitted from the present section and by this it is evident that the Legislature intends to lay down that the intent to defraud, defeat or delay must not be presumed merely from the effect of the transfer or from the absence or inadequacy of consideration, but is to be established by looking to *all the circumstances* surrounding the execution of the conveyance.

Fraud may however be presumed from the following circumstances: (1) where the transferor disposes of his entire estate, without any exception, including his wearing apparel; (2) where he remains in possession of the property although possession is professedly transferred; (3) where the transfer is made in anticipation of or pending a suit; (4) where the transfer is made in haste or secretly; (5) where there is a trust between the parties; (6) where the deed contains a statement that the transfer is made honestly, truly and *bona fide*; (7) where there is the absence or gross inadequacy of consideration, this presumption holds good in case of a sale, but not in case of a mortgage, for with regard to a mortgage it cannot be said that consideration is grossly inadequate, seeing that a mortgage can be for any amount regardless of the value of property—*Banwari v. Bhagmal* A. I. R. 1931 Lah. 213.

Ques. State if there is any exception to the rule that a person cannot set up his own fraud and recover property from his transferee. What is the reason of such an exception ?

*Ans :—*The following is the exception *e. g. where the fraud is inchoate*, i. e. where it is merely attempted but not carried into effect. Thus, when in order to save his properties from being sold in execution of a decree from which he had preferred an appeal, the owner executed a sham deed of relinquishment in favour of another person (who was aware of the sham nature of the transaction) but being successful in the appeal sued that person for a declaration that the deed of relinquishment was colourable and did not convey title, it was held that the plaintiff was entitled to succeed. The reason is that if in such a case, the Courts were to refuse aid to the plaintiff, they would be assisting in a fraud, for they would be giving an estate to a person (transferee) when it was never intended that he should have it. But where the intended fraud has been carried into effect, the Court will not allow the true owner to resume the individuality which he has once cast off in order to defraud others—*Jadu Nath v. Rup Lal*, 33 Cal. 967 (978).

Ques. Explain what is meant by “transfer in good faith” and “for consideration” within the meaning of Sec. 53 T. P. Act ? (Cal. 1927, 34).

*Ans :—*Second para of sub-section (1) of Sec 53 T. P. Act lays down that when the consideration for the transfer and good faith on the transferee's part are present, the intention of the transferor to defeat or delay his creditors is immaterial. A mere fraudulent intention on the part of the grantor alone will not invalidate the transfer.

if it is for valuable consideration and there is no want of good faith on the part of the grantee. The transaction may defeat or delay; the transferor may intend that it should; the transferee may know that it will; the consideration may be inadequate; and yet unless the transferee himself has been wanting in good faith, his rights will not be impaired—*Bhagwant v. Kedari*, 25 Bom. 202. The doctrine of constructive notice given in Sec. 3 should not be imported into this section. So, the mere knowledge of an impending execution of a decree against the transferor is not sufficient to make the transferee a transferee otherwise than in good faith, when he does not share the intention of the transferor to defeat or delay his creditors nor participates in the commission of the fraud—*Ishan Chunder v. Bishu Sardar*, 24 Cal. 825

Under this clause, *good faith is more essential than consideration*, so that if the element of good faith is not present, the transaction will be avoided even when there is some consideration. It is not sufficient to render a deed valid that it should be made upon good consideration; it must also be proved that it was made in good faith.

In the case of subsequent creditors i. e. where there are no debts due at the time, the transfer made by a person of extravagant habits in favour of his son or wife with the intention of saving the property from his own improvidence, and the consideration for the same being natural love and affection, no *mala fides* can be presumed merely from the possibility that it may prejudice the claims of subsequent creditors—*Sadashiv v. Trimbak* 23 Bom. 146.

Ques. Would preference to one or some creditors be *ipso facto* fraudulent within the meaning of Sec. 53 T. P. Act? (Cal. 1922)

Ans:—Preference to one or some creditors:—Section 53 renders void only those transfers which are made for the purpose of defeating all the creditors of the transferor to the benefit of the debtor, but it does not render void a transfer which is made merely for the purpose of preferring one creditor to another unless the transaction can be impeached in bankruptcy. Thus, where a debtor conveyed his property to one of his creditors in satisfaction of the debt due to him, and the creditor knew that his taking the conveyance had the effect of defeating or delaying the other creditors, still the transfer would not be voidable under this section, if it is for good consideration and retains no benefit for the debtor—*Hakim Lal v Mooshahar*, 34 Cal. 999, affirmed in *Mushahar v. Hakim Lal*, 43 Cal. 521 (P. C.) The mere fact that one creditor is preferred to another does not in itself render the transaction in favour of the preferred creditor voidable under this section, *if the debtor reserves no benefit for himself*—*Ma Pwa May v. Chettyar Firm*, 32 Bom. L. R. 117 (P. C.) A debtor for all that is contained in Sec. 53 T. P. Act, may pay his debts in any order he pleases, and may pay any creditor he chooses *Rani Mina Kumari v. Bijoy Singh*, 44 Cal. 662 (P. C.)

‘But a transfer which is not necessarily void under Sub-section (1) because it amounts to an assignment of all the transferor’s property for the benefit of a particular creditor or of particular creditors, may be void as amounting to a fraudulent preference within the meaning of sec. 56 of the Presidency-towns Insolvency Act and section 54 of the Provincial Insolvency Act. Therefore para 3 of sub-section (1) of Sec 53 T. P Act, which has been newly added, lays down that nothing contained therein shall affect the law of insolvency.

Ques. Explain the “Doctrine of Part Performance.” What are the essentials of the

doctrine of Part Performance as enunciated in Sec. 53-A T. P. Act ? (Bom. 1933; Adv. 1931; Cal. 1931, 34.)

Ans:--Doctrine of Part Performance.—The newly added Section 53-A gives statutory recognition to what has hitherto been regarded as the Doctrine of Part Performance, and applied by the Indian Courts to cases where the transfer was not effected by a registered instrument. *Mahomed Musa v. Aghore Kumar Ganguli*, 42 Cal. 801. The general ground upon which the doctrine is based is prevention of fraud. It is said that where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice. When a transferee has in the faith that the transfer would be completed according to law taken possession, it would be inequitable to allow the transferor to treat the transferee as trespasser. At the same time care is taken in framing the sec. 53-A that the law of registration is not evaded and that the introduction of the doctrine does not lead to perjuries and frauds which it is the object of the doctrine to prevent.

This section merely lays down that by reason of the part performance the transferor will not be entitled to eject the transferee, but it does not give any title to the transferee. In order that the transferee may acquire a perfected and marketable title execution and registration of the deed of transfer would still be necessary. The unregistered document shall be received in evidence for the purpose of proving part performance. The benefit of this section does not now extend to parol agreements. The doctrine of part performance was applied even though

there was no *written* document, in cases—40 All. 187, 44 Bom 586, 29 Bom. L. R 1419; but under the present section the doctrine cannot be applied unless there is a *written* document evidencing the transaction with reasonable certainty—*Ahmed v Allauddin*, A. I. R. 1933, Pat 485. The doctrine of part performance cannot be applied to void agreements. No amount of part performance can validate a void agreement.—*Laxta Prasad v. Sarnam* A I R. 1933 Pat. 165.

The essential elements of the Doctrine of Part Performance as enunciated in Sec. 53-A are:—

(1) That the contract to transfer for *consideration* any immoveable property should be in writing signed by the party or his agent;

(2) That the terms necessary to constitute must be ascertainable with reasonable certainty from the contract itself;

(3) That the transferee should in part performance of the contract take possession of the property or, if already in possession, should continue in possession and in the latter case should do some act in furtherance of the contract;

(4) That the transferee should perform or be willing to perform his part of the contract; but it is not necessary that the transferor's willingness should continue throughout the period of the agreement, if there are substantial acts of part performance which are unequivocally referable to the written agreement—*Suleman v. Patell*, 35 Bom L. R. 722;

(5) That when the contract has been partly performed all rights and liabilities under the contract should arise and be enforceable as between the parties notwith-

standing that the transaction has not been completed according to law; and

(6) That the application of the doctrine should not affect the rights of a transferee for *consideration* who has *no notice* of the contract or of the part performance thereof.

Chapter III.

Of Sales of Immoveable Property.

Ques. Define a sale. What are the essentials of a valid sale? (Cal. 1928, 30, 31, All 26.)

Ans.—"Sale" defined—"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised (S 54)

The essentials of valid sale are therefore (1) There must be "transfer of ownership." This marks the difference between a sale and a mortgage. In a mortgage the mortgagee holds the estate merely as a security for the debt, in a sale, on the otherhand, the proprietary rights pass in their full sense and absolutely. (2) In all sales it is evident that price is an essential ingredient, and that where it is neither ascertained nor rendered ascertainable, the contract is void. Price means *money*. A sale is a transfer of ownership in exchange for *money*. If a property is transferred in exchange for *something* other than money, the transaction is called an *exchange*. (3) The price must be *paid* or *promised* so mere non-payment of

price does not vitiate a completed sale. (4) Other formalities necessary to effect a valid sale are (i) in the case of (a) tangible immoveable property of the value of Rs. 100 and upwards (b) reversion and (c) intangible property (irrespective of value), there must be a registered instrument. (ii) In the case of tangible immoveable property below Rs 100, there must be delivery of possession of the property or in lieu thereof a registered instrument.

Ques. What is a contract for sale of immoveable property? Distinguish, between a 'sale' and a 'contract for sale.' (Bom. 1926, Adv. 33).

Ans :—Contract for Sale.—A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in, or charge on, such property. **Sale and contract for sale distinguished—**

(1) A 'sale' passes an absolute interest in the property to the purchaser; 'a contract for sale' does not of itself create any interest in, or charge, on the property.

(2) A 'sale' creates a right which is good against all the world, while a 'contract for sale' creates only a personal right in favour of the vendee to compel the vendor as well as any subsequent transferee from the vendor with notice of the contract, to specifically perform the contract.

(3) A mere contract of sale does not give rise to a right of preemption, such right can arise only upon a completed sale.

(4) A contract for sale of immoveable property does not require to be registered irrespective of value.

Ques. What is the legal effect of a contract for sale? State the difference between the English and Indian Law on the point. (Bom. 1926, Mad. 1923, 25).

*Ans:—*A contract for sale does not, of itself, create any interest in, or charge on, such property. The title in the property passes only upon the delivery of possession or registration of the document. The result is that in case of accidental loss of the property, the buyer is not affected. The case is different under the English law where the buyer is the equitable owner of the property from the date of the contract hence he is liable to pay the consideration money although before the execution of the conveyance the property itself is destroyed.

Where a *bona fide* contract, whether oral or written, is made for the sale of property, and another party afterwards buys the property with *notice* of the contract, the title of the party claiming under the contract prevails against the subsequent purchaser, although the latter's purchase may have been registered and he has obtained possession under his purchase—See *Gangaram v. Laxaman*, 40 Bom. 498. Thus the vendee's remedy in a contract of sale is a suit to enforce specific performance of the contract not only against the vendor but also against a transferee for the vendor with notice of the contract. But if the contract of sale is followed by delivery of possession and payment of purchase money, then, though there is no registered conveyance, the transaction is more than a contract, and the last para of Sec. 54 cannot apply. In such a case the vendor cannot say that the vendee has obtained no interest in the property. Nor can the property be attached as the property of the vendor, in execu-

tion of a decree against the vendor—*Ram Baksh v. Mughlam*, 26 All. 266.

Ques. Explain what is meant by “Equitable ownership”. Is such ownership recognised under the T. P. Act? (Bom. 1925)

Ans:—Under the English law, a contract for sale of real property makes the purchaser the *owner in equity* of the estate. The moment the contract is made, the vendor becomes a trustee for the purchaser, and is bound to preserve the property in its existing state pending completion of the contract, and is bound to account for all rents and profits received by him during that period. This equitable ownership is not recognised under the T. P. Act. The last para of Sec. 54 lays down that title to property can be transferred only by a conveyance and not by mere agreement between the parties. (It should be noted that prior to the T. P. Act a contract for the sale of immoveable property created an equitable interest in land and made the purchaser the owner in equity. (See *Dinkarrao v. Narayan*, 47 Bom. 215.) The purchaser acquires no interest in the property; he has only the right to get a conveyance in the terms of the contract; the vendor's ownership over the property remains unaffected.

Ques. Enumerate the duties imposed by the T. P. Act upon a vendor of immoveable property. (Adv. 33)

Ans:—The Liabilities of the Seller. In the absence of a contract to the contrary, the seller is bound,

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents,

(f) to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale; the interest on all incumbrances on such property due on such date, and except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing;

(h) where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Ques. What do you understand by covenant for title in cases of sale of immoveable

property and what remedies are open to the buyer for breach of such covenant. (Bom. 1925)

*Ans:—*Where in a deed of sale of immoveable property the vendor describes himself as the owner of the property sold, there is an implied warranty under clause 2 of Sec. 55, that he has full proprietary title, and the purchaser will be entitled to the benefit of it in the absence of fraud, notice, waiver or an express or implied contract.

Under this clause there is a statutory guarantee for good title unless the same is excluded by the contract of parties, and the question of knowledge of the purchaser does not affect his right to be indemnified under the Indian statute law. The rule of *Caveat emptor* of English law has no application in India.

Buyer's remedies—(1) If the vendor is found to have no title at all, the purchaser can repudiate the contract and is entitled to a refund of the purchase money. (2) But if the vendor has got a defective title, the buyer is not entitled to rescind the contract but can claim damages.

Ques. What are the rights of a vendor in respect of the unpaid purchase money? How can he enforce them? (Cal. 1931)

*Ans:—Vendor's lien—*if the vendor has already delivered possession of the property to the purchaser before the payment of the price, he is not entitled to rescind the contract and recover possession from the purchaser, or to resell the property to a third person. His remedy is to sue for the money and he has got a *charge* on the property for the unpaid purchase money under clause 4 Sec. 55.

The charge may be enforced by a suit for sale of the property, as if he were a mortgagee, under O 34 S. 15 C P. Code.

The vendor's charge is *non-possessory* and does not confer on him the right to retain possession by virtue of his charge and if he retains possession he is liable for mesne profits. The vendor's lien is a *personal* right so that no other person except the vendor himself can enforce it, and it is enforceable against the property not only in the hands of the purchaser but also in the hands of his transferee *with notice* but not against transferees for value and without notice of the vendor's lien. The vendor has a lien not only for the amount of the unpaid purchase-money but also for the interest thereon and the interest is payable "from the date on which possession has been delivered" The mere taking of a bond, bill or promissory note for the purchase money does not extinguish the lien, but if it is in *lieu* of the purchase money the lien is lost.

Ques. What facts are the seller and the buyer of an immoveable property bound, in the absence of any contract to the contrary, to disclose to each other and on the non-disclosure of which the sale is liable to be cancelled? (Cal. 25.)

*Ans—***Seller is bound to disclose material facts.—**In the absence of a contract to the contrary, the seller is bound to inform the buyer of any *material* defect in the property of which the seller is, but the buyer is not aware and which the buyer could not have himself discovered with ordinary care. Patent defects, such as the existence of an open foot-path over the property, need not be pointed

out by the vendor but he is bound to disclose all *latent* defects *known* to him, even though he may have stipulated to sell the property *with all faults*

The words 'material defects' include defects in title. This is now made clear by the addition of the words "or in the seller's title thereto". An omission to disclose flaws in the title which the purchaser has no apparent means of discovering will be fraudulent under this section, and the vendee will be entitled to get a refund of the purchase-money—*Haji Essa Sulleman v. Dayabhai*, 20 Bom. 522. But where the vendee buys with full knowledge that the vendor has not got a good title or in a case where the defect in title is such that the purchaser could have discovered it if he had taken reasonable care to investigate the title, the buyer cannot be said to have been defrauded by the vendor—*Harilal v. Mulchand*, 30 Bom. L. R. 1149.

Buyer's duty to disclose facts.—

Like the seller, the buyer too is bound to disclose to the seller any fact of which the buyer is aware but of which he has reason to believe that the seller is not aware and which materially increases the value of the property. An omission to make disclosure amounts to fraud irrespective of *intention*. Thus, a purchase for an inadequate price from an old and infirm woman ignorant of the value of the property sold was set aside on the ground of fraud—*Sadashiv v. Dhakubai* 5 Bom. 450. But although the seller is bound to disclose latent defects, the buyer need not mention latent advantages, as for instance, the existence of a mine on the property of the vendor known to him and unknown to the seller. So on disclosure of the mine the seller cannot sue to set aside the sale.

Ques. What are the Rights of the Seller ?

Ans—Rights of the Seller.—The seller is entitled to—

(a) The rents and profits of the property till the ownership thereof passes to the buyer ;

(b) Where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer, any transferee without consideration, or any transferee with notice of the non-payment, for the amount of the purchase money or any part thereof remaining unpaid, and for interest on such amount or part *from the date on which possession has been delivered.*

Ques. What are the rights and liabilities of the buyer ? (Adv. 1924, 25.)

Ans:—Rights of the Buyer—The buyer is entitled—

(a) Where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof ;

(b) Unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, for the amount of any purchase money properly paid by the buyer in anticipation of the delivery, and for interest on such amount ; and when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract, or to obtain a decree for rescission.

A purchaser cannot be said to be acting *improperly* if he refuses to take only a fraction of the property by paying full price, in accordance with Sec. 15 Specific Relief

Act.—*Sultan Kam v. Meera Rowthen* 56 M. L. J. 99. The vendee's lien is created on the property from the very moment the purchase money or a part thereof has been paid and it is lost only if there is a failure on the purchaser's part to carry out his part of the contract. 23 Bom. 56.

The Liabilities of the Buyer. The buyer is bound—

(a) To disclose material facts known to him but unknown to the seller and which materially increase the value of the property.

(b) To pay or tender the purchase-money on completion of the sale, in accordance with the direction of the vendor.

(c) Where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction etc. not caused by the seller.

(d) Where the ownership of the property has passed to the buyer, to pay all public charges and rent which may become payable in respect of the property; and to pay the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

The liability of the purchaser to pay rent etc. commences from the very date the ownership has passed to him, irrespective of the fact whether he obtained possession on that date; and the principle has been held applicable also to Court sales—*Ramasami v. Annadurai* 25 Mad. 454.

Ques. “A conveyance of non-existent property may, when made for valid considerations, be valid as a contract.” Discuss.

*Ans:—*The conveyance of non-existent property though inoperative as a conveyance is operative as an executory agreement which would attach to the property the moment it is acquired by the vendor and which in equity would transfer the beneficial interest to the vendee without any new act being done by the vendor to confirm the conveyance. There being, therefore, consideration for the contract, and the vendor having subsequently become possessed of the property, not only referred to in the deed of conveyance but answering to the description of the property set out therein, there cannot be any doubt that on these facts a Court of Equity would compel the vendor to perform the contract and that the contract would in equity transfer the beneficial interest to the vendee at the moment of the subsequent acquisition of the property by the vendor—*Rustom Ali v. Abdul Jaffar*, A. I. R. 1923, Cal. 535.

The above remarks apply *mutatis mutandis* to a mortgage of non-existent property—*Khobari Singh v. Ramprasad*, 7 C. L. J. 387.

Ques. Marshalling of sale—who can exercise that right and against whom? Bom. 1928.

*Ans:—*Marshalling of Sale—Section 56 T. P. Act enunciates the doctrine of marshalling as applied to sales just as Sec. 81 deals with the rule of marshalling as applied to mortgages. The rule runs thus “If the owner of *two or more* properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or person claiming under him or of any

other person who has for consideration acquired an interest in any of the properties."

The meaning of this section may be made clear by an illustration. Suppose A is the owner of two properties X and Y, both of which are mortgaged to a certain person C B purchases the property X He will be entitled to insist that his vendor A should satisfy his mortgage-debt out of the property Y (which is still unsold) in the first instance, as far as possible; if after the property Y is exhausted, there still remains any balance of debt unsatisfied, then and then only the property X will be drawn upon. This section does not absolutely relieve the property X, but only postpones it to the other property (Y) in the hands of the vendor mortgagor.

The words "as against the seller" in the old section showed that the section applied only as between the buyer and the seller, and not as between the buyer and the mortgagee of the seller, that is, the purchaser could not insist upon the mortgagee that the other property which was unsold and was still in the hands of the seller should be first sold in execution of his decree before proceeding against the property which he (purchaser) purchased—*Subraya v. Ganpa*, 35 Bom. 395. This was a great disadvantage to the purchaser, and the words "as against the seller" have therefore been now omitted.

The rule in this section does not apply to a case between purchaser and purchaser, the section being limited in its application to the case in which the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor.—*Sitaram v. Ramrao* A. I. R. 1931 Nag. 91.

The purchaser therefore can now exercise the right given by this section not only against the seller but also against the mortgagee of the seller.

The rule in this section does not apply to a case between purchaser and purchaser—*Din Dayal v. Gursaran*, 42 All. 336.

The benefit of this section may be claimed not only by a purchaser, but also by a mortgagee who has foreclosed and who therefore stands in the position of a purchaser.—41 Cal. 418. The rule in this section has been applied to execution sales but in a recent Calcutta case contrary view is taken. The principle of this section should not be applied to leases—*Lowe and Co. v. Hazarimull*, 30 C W. N. 183.

Discharge of Incumbrances on Sale.

Ques. What powers are rested in the Court for the purposes of compelling the satisfaction of any incumbrance to which immovable property sold may be subject ?

*Ans:—*Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court (i) in case of an annual or monthly sum charged on the property by paying into Court such amount as when invested in Govt. securities will be sufficient, by means of interest, to keep down the charge; (ii) in case of a capital sum charged, the amount to be paid into Court must be such as will be sufficient to meet the incumbrance and any interest due thereon. Thereupon the Court may declare the property free from incumbrance and make proper orders for giving effect to the sale and for applying the capital or

income of the fund in Court in the payment of satisfaction of the incumbrance. (Sec. 57).

This section is inapplicable if a decree is obtained on the incumbrance, because in such a case the incumbrance merges in the decree and is taken having ceased. The power of the Court is discretionary and it should be exercised only on the application of either the vendor or the purchaser.

Chapter IV

Of Mortgages of Immoveable Property and Charges.

Ques. Define a mortgage. (Bom. 1927; 29; Cal. 25, 30).

What are the essentials of a valid mortgage ?

Ans :—Mortgage Defined —A mortgage is the *transfer* of an interest in *specific* immoveable property for the purpose of *securing* the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability. (Sec. 58.)

The essentials of a valid mortgage are the following :

(1) There should be a *transfer* of an *interest* in immoveable property and in this respect it differs from a *charge*. It is not essential that there should be an *express*

transfer of interest, it is sufficient if the instrument taken as a whole operates such transfer. The interest transferred depends upon the *nature* of the mortgage.

(2) The immoveable property must be distinctly specified so that it may be readily recognised and identified.

(3) A mortgage must be supported by consideration. The consideration of a mortgage may be either (i) money advanced or to be advanced by way of loan; (ii) an existing or future debt; or (iii) the performance of an engagement giving rise to a pecuniary liability—the term ‘pecuniary liability’ means a legal obligation to pay damages whether liquidated or not.

(4) Formal requisites of a mortgage—Where the principal money secured is one hundred rupees or upwards, a mortgage, other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of simple mortgage) by delivery of property. (Sec. 59).

Ques. What are the different kinds of mortgages mentioned in the T. P. Act? What are the vernacular names for each? (Cal.27,32).

Ans.—The kinds of mortgages mentioned in the T. P. Act are :—

(1) Simple mortgage. (2) Mortgage by conditional sale. (3) Usufructuary mortgage. (4) English mortgage. (5) Equitable mortgage. (6) Anomalous mortgage.

Simple Mortgage — *Vernacular names*:—In Bengal a simple mortgage is called *Bandhaki khat* or *Rehan*; in U. P. it is known as *Rehan*, *Arh* or *Mushtaghra*, with grammatical variations; in Bombay, it is called *drista bandhaka*, *nazar gahana* or *taran gahan*; in Madras, it is designated as *drista bandhaka* or *Idu adamanam*. In the Ganjam district, it is known by the name of *Tanaka*.

Mortgage by conditional sale:—*Vernacular names*:—In Bengal, *Kotkobala*; in Orissa, *kalbandhanka*; in U. P., and C P., *Byebul-wafa*; in Madras, *Muddata kriyam* or *Dristabandhata*; in Bombay, *Gahan Lahan*; in Malbar, *Pornathan*.

Usufructuary Mortgage — *Vernacular names*:—In Bengal, *khat khalasi* or *Bhoga Bandhaki khat*; in Madras, *Diggu bhogyam* *Swadhin adamanam*.

Ques. Define a simple mortgage. What are the remedies of a mortgagee under a simple mortgage? What are the characteristics of a simple mortgage?

Ans.—**Simple Mortgage Defined**:—"Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgage property to be sold, and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage, and the mortgagee a simple mortgagee."

Remedies i. e. Rights of simple mortgagee:—In a simple mortgage, there being no transfer of ownership the

simple mortgagee can bring the mortgaged property to *sale only through Court*. He cannot sue to obtain possession of the property; he can only sue for sale. If the Court erroneously gives him possession, that possession does not amount to foreclosure, and the mortgagor can subsequently redeem the mortgage—*Papamma v Vir Pratap*, 19 Mad. 249 (252) (P. C.)

Characteristics of a simple mortgage. (1) The mortgagor undertakes *personal* liability. (2) No *possession* is delivered. (3) There is *no foreclosure*. (Sec. 67) (4) No power of sale out of Court, but a decree for sale of the mortgaged property must be obtained. (5) It must be effected by a *registered* instrument even if the consideration is below Rs. 100 (Sec. 59).

Ques. Define a Mortgage by conditional sale. What are the characteristics of a mortgage by conditional sale? What are the remedies of the mortgagee to recover the mortgage debt in the case of a mortgage by conditional sale. (Bom. 1924; Cal. 29, 30, All. 26)

Ans:—Mortgage by conditional sale:—“Where the mortgagor ostensibly sells the mortgaged property

on condition that, on default of payment of the mortgage-money on a certain date, the sale shall become absolute, or

on condition that, on such payment being made the sale shall become void, or

on condition that, on such payment being made, the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale,"

Characteristics of a mortgage by conditional sale.

(a) The mortgagor ostensibly *sells* the mortgaged property (b) The condition is that the sale shall be absolute in default of payment on a particular date or that the sale shall be void on such payment and the property retransferred. (c) The remedy of the mortgagee is by foreclosure and not by sale (Sec. 67). (d) It must be by a registered writing if the consideration is Rs. 100 or upward: if less than Rs 100, it may be effected by delivery of the property or by a registered document (Sec. 59).

Remedies or Rights of a mortgagee by conditional sale:—The mortgagee is not entitled to institute a suit for sale, for the contract provides for the mortgage ripening into a sale in default of payment and implies an intention on the part of the mortgagee to take the mortgaged property in satisfaction of the debt when that event has happened. His remedy is accordingly confined to a suit for foreclosure *Vankatasami v. Subramanya*, 11 Mad. 88 The essential characteristic of a mortgage by conditional sale is that on the breach of the condition of repayment within the stipulated period, the contract executes itself and the transaction is closed and becomes one of absolute sale, *to be enforced by foreclosure—Sheeram v. Babu Singh* 48 All. 302.

Ques. What do you understand by "Usufructuary mortgage"? Is a usufructuary mortgagee ever entitled to sue for the mortgage amount? (Bom. 1935 Cal. 1930).

Ans:—Usufructuary mortgage. “Where the mortgagor delivers possession or *expressly or by implication binds himself to deliver possession* of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property, or any part of such rents and profits, and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money the transaction is called a usufructuary mortgage ” Sec. 58 (d).

A pure usufructuary mortgagee can sue neither for foreclosure nor for sale, Sec. 67 (a), since his contract is to realise his security out of the usufruct of the property. In a Madras Full Bench case it was held that a usufructuary mortgagee, who was not given possession by the mortgagor, ceased to be a usufructuary mortgagee, and was entitled to sue for foreclosure or sale—*Subbamma v. Narayya*, 41 Mad. 259 (F. B.) But this view is no longer correct in view of the amendment of 1929 marked in italics in the above definition. In a pure usufructuary mortgage, any personal liability on the part of the mortgagor is excluded. If the deed itself contains a personal covenant, the mortgage becomes a combination of a simple and usufructuary mortgage, but under the new clause (g) of Sec 58 such mortgage would be treated as an anomalous mortgage. Such a personal liability may, however, arise under the circumstances mentioned in Sec. 68. Under clause (d) of Sec. 68 if the mortgagor fails to give possession of the property or to secure to him quiet possession, the usufructuary mortgagee is entitled to sue the mortgagor for the mortgage-money; or he may at his option sue the mortgagor for recovery of possession of the property. But the mortgagee cannot sue for the

money unless he is actually out of possession or where the dispossession is due to his own default.

Ques. Point out the essentials of an English mortgage. What remedy is open to a mortgagee in such a mortgage? (Bom. 1924, 25)

Ans —English Mortgage.—Essentials. The three essentials of an English mortgage as defined in Sec 58 (e) are:—

(1) That the mortgagor should bind himself to repay the mortgage-money on a certain day ;

(2) That the property mortgaged should be transferred absolutely to the mortgagee; and

(3) That such absolute transfer should be made subject to the proviso, that the mortgagee will retransfer the property to the mortgagor, upon payment by him of the mortgage-money on the day as agreed. *Narayan v. Venkaterama* 25 Mad. 220 (F. B.)

An English mortgage is rarely executed in the mofussil, and when executed, is treated as a mortgage by conditional sale, from which it has very little distinction (the only difference being that in the former there is a personal covenant to pay, which is absent in the latter).

Remedy. Under the old Sec. 67,³ the remedy was both by foreclosure and sale but by² the Amendment of 1929 the remedy is by sale only and not foreclosure. The power of sale conferred by Sec. 69 in the case of an English mortgage need not be expressly stated in the mortgage deed, but it cannot be exercised unless the parties are Europeans.

Ques. Define an Equitable mortgage
What are the characteristics of an equitable

mortgage and what are the mortgagees remedies under such a mortgage? (Cal. 35; Bom. 1935, Adv. 1922, 24.)

Ans.—Equitable mortgage Defined—"Where a person in any of the following towns, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, and in any other town which the Governor-General in Council may, by notification in the Gazette of India, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds". Sec. 58 (f).

Characteristics and essentials of an Equitable mortgage:—

(a) It is created in the towns of Calcutta, Madras, Bombay, etc. If executed outside those towns it is invalid,

(b) It is effected by deposit of material title-deeds; no delivery of possession takes place. It is not necessary that the property to which the title-deeds relate should be situate in those towns, it may lie outside those towns, in a province to which the Act applies or not. *Central Bank of India v. Nusserwanji* 34 Bom. L. R. 1384.

(c) It is made to secure a debt or advance already made and to cover future advances as well.

(d) The title-deeds must be deposited *with intent to create a security thereon*.

(e) The mortgagee's remedy is by sale only and not foreclosure (Sec. 67).

(f) No registration is necessary even if there is a writing recording the deposit (Sec. 59). But registration

is necessary when the *document* embodies the terms of the agreement between the parties and *constitutes* the *bargain* or agreement between them purporting or *operating* to create or declare any *right*, title or interest in the property and not merely a written record of the particulars of the title deed the subject of an agreement constituted in fact by the act of deposit and the payment of money.—*National Bank of India v. R C Nazir & Co* 34 Bom. L R. 748.

Remedies —The mortgagee's remedy is by sale only and not foreclosure (Sec. 67) The mortgagee has no power to sell without the intervention of the Court, except where a power of sale is expressly conferred by the mortgage deed and (i) the mortgagee is the Secretary of State for India in Council; or (ii) where the mortgaged property or any part thereof is situate within the town of Calcutta, Madras, Bombay etc., (Sec. 69. (b) (c). All the provisions, regarding the rights or liabilities of the mortgagor and mortgagee, relating to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds. (Sec. 96).

Ques. Define an Anomalous mortgage.

What mortgages are designated as “Anomalous mortgages” and how are the rights and liabilities of parties to such mortgages determined? (Bom. 1929, Cal. 1935).

Ans:—Anomalous mortgage:—“A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, and English mortgage or a mortgage by deposit of title-deeds within the meaning of Sec. 58 is called an anomalous mortgage” Sec. 58 (g).

Under the old sec. 99, an anomalous mortgage was a mortgage "not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the first and third or the second and third of such forms." Under the present clause (g) of sec. 58 those two classes of mixed mortgages have been included in anomalous mortgages.

Anomalous mortgages will now include the following classes of mortgages —

(a) Combination of simple and usufructuary mortgage ;

(b) Combination of mortgage by conditional sale and usufructuary mortgage ;

(c) Local mortgages, such as otti, kanom etc.

(d) Other miscellaneous forms. Rights and liabilities :—

"In the case of an anomalous mortgage, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed and so far as such contract does not extend, by local usage." Sec. 98.

Thus, where according to the terms of an anomalous mortgage-deed there was no provision for payment of interest after 4 years, *held* that interest was not claimable after that period.

It was held in certain Madras cases that since the rights of the parties are governed by the terms of the contract, any covenant agreed between the parties in a deed of anomalous mortgage must be enforced, even though it amounted to a clog on redemption. But this view has now been overruled by a Privy Council case—*Muhammad Sher Khan v. Raja Seth Swami Dayal* 44 All. 185 (P. C.)

Ques. What are the characteristics of (a) Usufructuary mortgage, (b) English mortgage, (c) Anomalous mortgage. (Adv. 1923, 27, 31, Cal. 30. All. 34.)

Ans:—Characteristics of Usufructuary mortgage:—

(a) There is delivery of *possession* to the mortgagee (b) He is to retain possession until repayment of the money and to receive rents and profits or part thereof in lieu of interest, or payment of the mortgage money or partly in lieu of interest or partly in payment of the mortgage-money. (c) There is redemption when the amount due is personally paid or is discharged by rents and profits received. (d) There is no remedy by sale or foreclosure (Sec. 67). (e) If for Rs. 100 or upwards, it must be registered; if below Rs. 100, it may be by registered deed or by delivery of property (Sec 59)

Characteristics of English mortgage —(a) It is followed by delivery of possession. (b) There is a personal covenant to pay the amount (c) It is effected by absolute transfer of property with a provision for retransfer in case of repayment of the amount due. (d) The remedy is by sale and *not by foreclosure*—(Sec. 67). (e) Power of sale out of Court is conferred on certain persons under certain circumstances (Sec 69).

Characteristics of Anomalous mortgage —(a) It now includes a simple mortgage usufructuary and a mortgage usufructuary by conditional sale Possession may or may not be delivered. (b) The remedy is by sale, or by foreclosure, if the terms of the mortgage permit it (Sec. 67). (c) If for Rs. 100 or upward it must be registered; if below Rs 100, it may be by registered deed or by delivery of possession (Sec 59).

Ques What is the difference between a mortgage with a conditional sale and a sale with a clause for repurchase? (Adv. 1927; Cal. 22, 30. All. 26).

Ans.—According to the definition given in Sec. 58 (c) a mortgage by conditional sale is an ostensible sale on condition that upon repayment of the money being made on a certain date the buyer shall transfer the property to the seller. The question then arises, whether the condition in the sale-deed is expressed with sufficient clearness so as to convert the sale into a mortgage or whether it merely gives the vendor a right to repurchase. The line of division between a mortgage by conditional sale and a sale with provision for a repurchase is a very fine one and to a layman it seems to be a distinction without difference.

Prior to the addition of the proviso to clause (c) of Sec. 58 T. P. Act a mortgage by conditional sale was usually made by two documents, one being a sale-deed and the other containing the condition of reconveyance; and the question frequently arose whether the second document operated to convert the sale into a mortgage so as to give the vendor the right of redemption such as a mortgagor enjoys, or it simply stipulated that the vendor would have a right to repurchase.

The following tests were applied for the determination of the question:—

(1) Whether the two documents were part and parcel of the *same transaction* or were mutually *independent*.

(2) Whether *possession* was delivered to the purchaser.

(3) Whether there is a stipulation regarding the payment of interest.

(4) Whether the two documents were executed on the *same date*.

(5) Whether the relation of *debtor and creditor* subsists between the parties.

(6) Whether the amount paid as consideration is grossly inadequate.

(7) Whether the two transactions are between the *same parties*.

(8) The best general test as to the nature of the transaction is "the existence or non-existence of a power in the original purchaser to recover the sum named as the price for re-purchase, if there is no such power, there is no mortgage "

The ostensible or real nature of the transaction can, however, be only determined by finding out the intention of the parties. Since the decision of the Privy Council in *Balkishan Das v Legge*, 22 All. 149, it has been a well settled rule that it is not open to Courts to allow any extraneous evidence in order to find out the intention of the parties. In order to avoid the difficulties indicated above two things are laid down in the proviso newly added by Amendment Act of 1929: (1) first, the mortgage by conditional sale is to be effected by *one* document; and thus the various criteria for determining whether the two documents operate to create a mortgage will no longer be necessary; (2) and *secondly*, the condition which converts the sale into a mortgage must be embodied in the document, so that no extrinsic evidence will be admissible to prove that a document which purports to be an absolute sale is in reality a mortgage.

Ques. What is the difference between the following:—

(1) Mortgage by conditional sale and English mortgage (Bom. 1924, Adv. 1930, 33. Cal. 30, 31 All. 27.)

(2) Simple and Usufructuary mortgage. (Adv. 30.)

Ans—Difference between a Mortgage by conditional sale and an English mortgage.—In an *English mortgage* there is a personal covenant to pay the amount, and it is effected by absolute transfer of property with a provision for retransfer in case of repayment of the amount due on a certain date. But in a *mortgage by conditional sale* there is no personal liability to pay; the mortgagor ostensibly *sells* the mortgaged property and is to be perfected into absolute sale on failure of the payment of the mortgage-money on a certain date

In an *English mortgage* the ownership is wholly transferred to the creditor and therefore has the right to immediate delivery of possession of the property; while in a *conditional mortgage*, the creditor acquires a qualified ownership and therefore has no such right.

In an *English mortgage* the remedy is by sale only while the remedy of the *conditional mortgagee* is by foreclosure and not by sale.

An English mortgage is rarely executed in the moffussil, and when executed, is treated as a mortgage by conditional sale. Where the mortgaged property is situated in the moffussil, and one of the parties is a Hindu, a mortgage though styled as an English mortgage does not transfer an absolute interest in favour of the mortgagee—*Ansur Subba Naidu v. Secretary of State*, 1917 M.W.N. 794.

Simple and Usufructuary mortgage distinguished—In simple mortgage the mortgagor undertakes *personal* liability and no possession is delivered. In a usufructuary mortgage there is delivery of possession and the mortgagee is entitled to remain in possession and to the enjoyment of the usufruct until payment of the mortgage money. In simple mortgage there is no foreclosure, no power of sale out of Court, but a decree for sale of the mortgaged property must be obtained. In a usufructuary mortgage, there is no remedy by sale or foreclosure, there is redemption when the amount due is personally paid or is discharged by rents and profits received. A simple mortgage must be effected by a *registered* instrument even if the consideration is below Rs 100. A usufructuary mortgage must be registered if for Rs. 100 or upwards, if below Rs. 100, it may be by registered deed or by delivery of the property.

Ques. What is the effect of invalid attestation ?

Ans:—Effect of invalid attestation.—If a document is not validly attested as required by sec 59 T. P. Act the mortgage is ineffectual but it does not follow that, failing to operate as a mortgage, it will still operate as a charge. Though the deed may be ineffectual as a mortgage for want of attestation, still it will be admissible as an evidence of a personal covenant to repay the debt; whether the deed has been registered or not, and a simple moneydecree can be passed on the personal covenant to pay. 46 Mad. 64. But this rule will not hold good in the case of a usufructuary mortgage in which the mortgagor does not bind himself personally to repay the money—44 Cal 388 (P. C.).

Ques. A, an illiterate person, signed a deed of mortgage by putting his mark on the document. The mark was described by the scribe of the deed. The deed was also attested by two independent witnesses. Subsequently, the deed was sought to be proved by the testimony of one of the witnesses and the scribe. Was the deed duly proved? Discuss.

Ans —Yes, the scribe was a valid attesting witness, because, the execution was complete when the mortgagor unable to write his name placed his mark thereon; the mark was his signature and was independent of any description by which the mark was explained. The function of the scribe ended when he signed his name at the conclusion of the body of the document: he thereafter signed his own name under the description of the mark made by the executant; with a view to authenticate the mark, that is, to vouch the execution of the deed by the marksman, in other words, to act as an attesting witness—*Govind v. Bhau Gopal* 19 Bom L R. 147.

Rights and liabilities of mortgagor

Ques. What are the rights of a mortgagor to redeem?

Ans —Rights of mortgagor to redeem:—At any time after the principal has become *due*, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee (b) where the mortgagee is in possession of the mortgaged property, to deliver

possession thereof to the mortgagor, and (c) at the cost of the mortgagor, either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Provided that this right has not been extinguished by act of parties, or by *decree* of a Court. (Section 60).

Ques. State the law regarding the redemption of portion of the mortgaged property.

*Ans:—Redemption of portion of mortgaged property:—*The last para of sec. 60 runs as follows—"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his share only, on payment of a proportionate part of the amount remaining due on the mortgage, except *only* where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

This para lays down the general rule that a mortgage is one and indivisible and a suit by a co-mortgagor to redeem only his portion of the properties mortgaged is not maintainable; and also lays down that the indivisible character of a mortgage is broken up *only* when the mortgagee *acquires the share of a mortgagor*. But the rule is subject to contract to the contrary.

The rule as to indivisibility of a mortgage applies not only where there are several mortgagors but also where there are several mortgagees. And no redemption can be effected of a portion of the mortgaged property by paying to one of the mortgagees his separate debt.

This section does not debar the owner of a part of the equity of redemption from offering to redeem the whole mortgage. Indeed he is bound to offer to redeem the whole.

Ques. Discuss the saying "the right to redeem and the right to foreclose are co-extensive" (Adv. 1930, 32. Cal. 1910)

*Ans:—*The general principle as to redemption and foreclosure is that in the absence of any stipulation, express or implied, to the contrary, **the right to redeem and the right to foreclose are coextensive**, and that where there is a stipulation to pay a mortgage-debt within (e.g) ten years, the mortgagor cannot redeem at an earlier date.

In Sec. 60 T. P. Act it was stated that "at any time after the principal money has become payable, the mortgagor has a right etc." The word 'payable' gave rise to a diversity of opinion. The diversity of opinion is to be found in *Rose Ammal's* case (23 Mad 33) and *Husaini's* case (29 All. 471) In the Madras case it has been remarked that money is said to be 'payable' when it is payable by the mortgagor, i. e. when the mortgagor is entitled to pay it, even though it is not "due" to the mortgagee, i. e. even though the mortgagee is not entitled to call for the money. The Allahabad High Court holds that money becomes 'payable' when the payment becomes obligatory upon the mortgagor i. e. when the mortgagee can enforce payment of it and not earlier. There is nothing in law to prevent the parties from stipulating expressly that the mortgagor may discharge the debt within the specified period and take back the property, but it is an elementary proposition that the mortgagee is not entitled to foreclose before the mortgage-money has become *due*. As a corollary to that proposition it is

reasonable to hold that a mortgagor also should not be allowed to redeem before the mortgage-money has become *due*. In order to remove this divergence of opinion, the Legislature has substituted, by the Amendment Act of 1929, the word "payable" by the word "due" and has thus adopted the rule of mutuality, viz, that *the right of redemption and the right of fore-closure are co-extensive*.

Ques. What is meant by a clog on the equity of redemption? What is its legal effect? (Bom. 1924, 27, 31, 35. Adv. 1923, 25, 28, 30, 33. Cal. 30.)

Ans.—**Clog on the Equity of Redemption**—Redemption is of the very nature and essence of a mortgage, it is inherent in the thing itself. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which security was given is what is meant by 'clog' or fetter on the equity of redemption and is *void* not only as against the mortgagor himself but also as against his assignee. 32 Bom. L. R. 882 (P. C.) An agreement which amounts to a clog on the equity of redemption cannot be enforced, even though it is contained in a consent decree, nor can it be a defence in a subsequent suit for redemption.—*Ambu v. Kelu* A. I. R. 1930. Mad 305 The doctrine of clog on redemption is expressed in the maxim "once a mortgage, always a mortgage, and nothing but a mortgage" by Lord Davy in the leading case of *Noakes v. Rice*.

Thus a mortgagee cannot stipulate to be allowed to remain in possession as a perpetual tenant at a fixed rent even after redemption. Again the stipulation that the mortgagor alone shall be entitled to redeem is invalid, similarly a condition that redemption shall be postponed

until all debts due from the mortgagor to the mortgagee are paid off is void. A mortgagee cannot, by any contract entered into with the mortgagee *at the time*, give up his right of redemption, but there is nothing to prevent that being done by an agreement which in substance and in fact is *subsequent* to and independent of the original bargain See—*Shankar Dhonddev v Yeshwant*, 22 Bom. L. R. 965. *All clogs are not bad and unenforceable*. Everything depends upon the nature of the fetters. Thus, a provision in the deed postponing the mortgagor's taking possession so long as there were fruit-bearing trees on the land planted by the mortgagee and which the document allowed him to plant, is not a clog on the equity of redemption—*Genu Tukaram v. Narayan* 45 Bom. 117. Also a right of preemption given to the mortgagee in case the mortgagor should proceed to a sale of the mortgaged property is good

Ques. Explain and illustrate the statement "Once a mortgage always a mortgage." (Bom. 1925, 28, Adv. 1925, 27, 30; Cal. 30, 32, All. 25, 27.)

Ans:—Once a mortgage always a mortgage.—The phrase "once a mortgage always a mortgage" was laid down in *Howard v Harris*. It means that an estate could not at one time be a mortgage and at another time an absolute conveyance by one and the same deed. If a conveyance was intended to be a mortgage or to pass a redeemable estate, it will be so construed notwithstanding covenants to the contrary. In other words if it is shown that an interest in property was transferred as *security* for the repayment of debt, no clause or covenant in the transaction will convert it into a conditional sale or disentitle the mortgagor to get back the property on his paying the

mortgage debt. At Common Law, the stipulation to pay the mortgage money was scrupulously observed but Equity allowed the mortgagor to redeem even if the stipulated time was gone regarding such a transaction as a mere security. The mortgagor, though he lost his legal right to redeem had an "equity to redeem" on payment within reasonable time of the principal, interest and costs. The right, thus opened in favour of the mortgagor, came to be technically called as Equity of Redemption.

The principle of the maxim is followed in all cases of mortgages by conditional sale. Thus, for example, where X mortgaged land to Y and the instrument of mortgage contained a stipulation that if the principal is not paid off within 5 years from the date of the mortgage, the land shall become the property of the mortgagee and the right to redeem extinguished, it was held that the mortgagor can redeem the property by paying off the principal and interest, though the stipulated time for payment has been allowed to pass by—*Ramji v. Chento* 1 B. H. C. R. 103 *Lalta Prasad v. Jagdish* 48 All. 787. Equity does not allow the clogging of the right of redemption.

Ques. Explain fully the rule that a mortgage is one and indivisible and mention all the exceptions to it. (Adv. 1932. Cal. 25, 29)

Ans:—Mortgage is one and indivisible. The general rule is that the mortgage debt being indivisible and the mortgaged property being held in its entirety as security for the debt and every part of it, the property can only be redeemed in its entirety on payment of the whole debt. In other words, the holder of a partial interest in the equity of redemption cannot redeem a part of the property on payment of a proportionate part of the debt. So also one

of the mortgagee cannot claim to realise a portion of security for a proportionate part of the debt. The mortgagors are entitled to be made parties to one proceeding and are not to be exposed to a variety of proceedings.

This general rule is deducible from sections 60 and 67 of the T P. Act. But there are the exceptions to the rule and the following are the cases where a mortgagor can claim to depart from the rule.

(1) Where one of the terms of a mortgage provides for partial redemption; as the rule is to be applied subject to a contract to the contrary—13 A. L. J. 372.

(2) Where the co-mortgagors have a distinct and separate interest.

(3) Where the mortgagee recognises a partition of the mortgaged property amongst the comortgagors—*Mahadaji v Ganpatshet* 15 Bom. 257, 28 Mad. 555.

(4) When the mortgagee (all when there are more than one) himself acquires a *portion* of the mortgaged property—*Moro v. Balaji* 13 Bom. 45 and not where the *whole* of the mortgaged property. *Venkat Reddy v. Kunyappa* 47 Mad. 551.

Similarly, a mortgagee may be able to depart from the rule and may be able to institute a suit as to part only of the debt. Thus with the consent of the mortgagor, the indivisibility of the security may be severed—*Vijaya Bhushanammal v. Evalappa* 38 Mad. 17. So also where one of the two mortgagees *purchases* the equity of redemption, the other co-mortgagee may regard the security as split up—*Bisheshar v. Lalik Singh* 5 All. 257. But not where the mortgagor has conveyed the property to one co-mortgagee without the consent of the other mortgagee—*Arunachalam v. Ramasamy* 1928 M. W. N. 518.

.Ques. What is the effect of release or purchase of a portion of the mortgaged property by the mortgagee ? (Bom. 1924.)

*Ans :—*The general rule under clause 5 of Sec. 60 T. P. Act. is that the mortgage debt being indivisible and the mortgaged property being held in its entirety as security for the debt and every part of it the property can only be redeemed in its entirety on payment of the whole mortgage debt, in other words, the holder of a partial interest in the equity of redemption cannot redeem a part of the property on payment of a proportionate part of the debt. A co-mortgagor, a purchaser of a portion of the mortgaged property or a partial owner of the equity of redemption is not at liberty to redeem that part only without redeeming the rest, in fact he is entitled to redeem the whole mortgage and seek his contribution from others.

The integrity of the mortgage can however be broken up "*only where a mortgagee, or if there are more mortgagees than one all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor*", and each of the owner of the remainder of the property becomes entitled to redeem his own share upon payment of a proportionate part of the amount due on the mortgage. But in such cases i. e. when thus the indivisible character of the mortgage is broken up, neither a co-mortgagor nor a purchaser of a portion of the equity of redemption is entitled to redeem more than his own share in the property. The word 'acquired' is not restricted to acquisition by purchase, but it also applies to acquisition by any other mode recognised by law. Thus, where the mortgagee has acquired a share of the mortgaged property by *foreclosure* or by *inheritance*, or at a sale in execution of a 'money-decree.

There is a merger of rights and the integrity of the mortgage is broken up.

But in a Bombay case it has been held that an owner of a part of the equity of redemption of mortgaged properties is entitled to redeem that portion when the mortgagee has acted in such a way as to *release* a portion of the property from the mortgage debt—*Mayashankar v. Burjorji*, 27 Bom. L. R. 1449. Similar view has been expressed in 30 Cal. 755 and 9 Mad. 453. With a view to get rid of the effect of the decision in 27 Bom. L. R. 1449, the word 'only' has been inserted by the Amendment Act of 1929. Now, therefore *apart* from special arrangement, the integrity of the mortgage can only be broken up in case the mortgagee *purchases* or otherwise acquires a portion of the mortgaged property, and not when the mortgagee *releases* a portion of the mortgaged property—*Haji Ali v. Mojbuddin* 45 All 524.

Ques. When is a mortgagor's right of redemption lost? (Cal. 15)

Ans.—Mortgagor's right of redemption Extinguished by act of parties or by decree of a Court. The mortgagor, after paying or tendering the money, can compel the mortgagee to (a) deliver the mortgage deed; and (b) either to reconvey the mortgaged property to the mortgagor; or to execute a registered acknowledgment. His right of redemption is lost when it has been extinguished by act of parties or by decree of a Court.

The phrase 'act of parties' denotes a release or other such transaction *standing apart* from the mortgage transaction under which the right of redemption comes into existence. The mere fact that one of several co-mortgagors is the registered occupant of the mortgaged land does not entitle him to transfer the portion of the equity

of redemption belonging to his co-mortgagors. Such a transfer in favour of the mortgagee does not operate to extinguish the right of the co-mortgagors to redeem their shares of the mortgaged land—*Lalchand v. Khandu* 22 Bom. L. R. 1431.

The mortgagor's right of redemption is extinguished by a *final decree* of the Court for sale or foreclosure. In *Krishnan v. Mahadev*, 25 Bom. 104, the mortgagor was allowed to redeem the property even after its formal sale and before confirmation. The right of redemption is extinguished when the land is sold by order of the Govt owing to non-payment of assessment, under Sec. 56, Bom. Land Revenue Code—*Abdul Rahman v. Vinayak*, 29 Bom. L. R. 1056.

The order (decree) of court however does not mean an order passed without any trial or ordinary hearing of the parties. Therefore where a prior suit for redemption is dismissed owing to a compromise—*Basangouda v. Rudrappa* 28 Bom. L. R. 1507, or for default of appearance—*Kashiram v. Maheshwar* 30 Bom. L. R. 1039, such an order does not extinguish the right of redemption nor prevents the mortgagor from bringing a fresh suit for redemption. An abatement of a previous suit brought by the father does not bar a second suit for redemption brought by the son—*Ramchandra v. Shrivatrao* 40 Bom. 248.

Ques. Under what circumstances can a second suit for redemption lie ? (Adv. 1931).

Ans:—Second suit for redemption—It is now settled law that when a suit for redemption has been instituted and a decree has been passed for redemption but not executed, a subsequent suit for redemption of the same mortgage is maintainable. *Ramji v. Pandharimath* 43

Bom. 334 (F. B.), Sita Ram v. Madho Lal 24 All. 44 (F. B.) (Contra-Vedapuratti v. Vallabha 25 Mad. 300 (F. B.)).

The withdrawal by the mortgagor of a previous suit for redemption, or a previous dismissal of a suit for redemption for default of appearance, does not extinguish the right of redemption nor prevents the mortgagor from bringing a second suit for redemption 30 Bom. L. R. 1089. So also is the effect of a compromise. An abatement of a previous suit brought by the father does not bar a second suit for redemption brought by the son—40 Bom. 248.

Ques. Explain briefly “Consolidation of mortgages.” (Bom. 1924).

Ans:—Consolidation of mortgages. The doctrine of consolidation enabled the mortgagee entitled to the mortgages on two different properties mortgaged by the same mortgagor to consolidate those mortgages against the mortgagor and force him to redeem all of them or to prevent him from redeeming one of them without redeeming the others. Of course, there could be no question of consolidation as regards any mortgage where the time for redemption had not expired. The doctrine was based on the maxim “He who seeks equity must do equity.” This inequitable doctrine is abolished by S. 61 T. P. Act in this country in the same way as the Conveyancing Act (and recently the Property Act 1925) has done in England.

By the Amendment Act of 1929, Sec. 61 has been redrafted so as to make it more exhaustive. The old section applied to cases where *different* properties were mortgaged and not where the *same* property was mortgaged under different mortgages. Now under the new section the mortgagor can redeem simultaneously all debts or any one or more of them which have become due to the same mortgagee. The same principle ought to apply

where portions of one and the same property are mortgaged separately. Accordingly, any reference to 'property' has been omitted and the words two or more mortgages have been used and the illustration has been omitted. The effect of this change is to overrule the view taken by the judicial committee in *Ramanarayaningar v. Maharaja of Venkatgiri*, 50 Mad. 180 (P. C.) and restore the Madras decision 44 Mad. 301. The section applies "*in the absence of a contract to the contrary*" so that consolidation can take place *by contract* of the parties.

Ques. State the law of accessions to mortgaged property. Discuss the respective rights of the mortgagor and the mortgagee as regards such accession. (Bom. 1925, 26, Cal. 22, 34, Mad. 15. All. 25.)

Ans:—Law of Accessions to Mortgaged Property :

The principle of the law of accession as laid down in the T. P. Act is in accordance with the observations of the Privy Council: "Most acquisitions by the mortgagor enure for the benefit of the mortgagee, increasing thereby the value of the security, (Sec. 70) and similarly, any acquisitions by the mortgagee are accretions to the mortgaged property or substitutions for it, and thereby subject to redemption" (Sec. 63).

Section 63 deals with the rights of the mortgagor to accessions to mortgaged property. The accessions may be either natural or artificial. The first para deals with *natural* accessions such as alluvion; it states that the mortgagor, upon redemption, shall, in the absence of a contract to the contrary be entitled to such accessions as against the mortgagee. The second para deals with *acquired* accessions i. e. accessions made at the expense of the

mortgagee. These are either (1) capable of separation from the principal or (2) incapable of separation.

(1) Where the accession is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor has the option of taking it on payment to the mortgagee the expense of acquiring it, and not its estimated market value, or he may refuse to take it. If the mortgagor elects to take it the mortgagee cannot refuse it.

(2) Where the accession is incapable of separation the mortgagor is entitled to all acquisitions and is not bound to pay except in two cases; (1) where the accessions are necessary to preserve the property from destruction, forfeiture or sale; or (2) where they were made with the mortgagor's consent

It has been held in *Sorabji v. Dwarkadas* 34 Bom. L.R. 1310, that Sec. 63 of the Act cannot be read as entitling the mortgagor to recover on redemption acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within S. 90 of the Indian Trust Act, i. e. when he did not have any special advantage by reason of his position as mortgagee in acquiring them

Section 70 states that if after the date of a mortgage any accession is made to the mortgaged property, the mortgagee, shall, in the absence of a contract to the contrary, for the purposes of his security, be entitled to such accession.

For the purposes of sec. 63 as well as sec 70, the accession to the mortgaged property must take place before the mortgage becomes extinguished. The provisions of both the sections hold good in the absence of any contract to the contrary.

Ques. Under what circumstances and to what extent can a mortgagee in possession recover cost incurred in effecting improvements on the mortgaged property? (Bom. 1931).

Ans:—Improvements by Mortgagee—Formerly (i. e. before Amendment of 1929) there was a conflict of opinion as to whether and to what extent the mortgagee was entitled to charge or obtain any compensation for improvements made, as there was no express provision. But now the new section 63-A lays down that—

(1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2) be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and (i) was necessary to preserve the property from destruction or deterioration or (ii) was necessary to prevent the security from becoming insufficient or (iii) was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor. Sec. 63-A. Sub-section (1) lays down that ordinarily a mortgagee is not at liberty to effect improvements and charge the

mortgagor therewith. The mortgagee has no right to lay out large sums of money in improving the property so as to make it utterly impossible for the mortgagor with his means ever to redeem. This is called 'improving a mortgagor out of his estate'—*Dnyanu V. Fakira* 45 Bom. 1305

Subsection (2) lays down the circumstances under which the mortgagor is liable to pay the cost of improvements and thus does not leave to the discretion of the Court as in England, the question of determining what improvements are reasonable and necessary.

Ques. Mention the statutory covenants running with the mortgage. (Bom. 1929,)

Ans.—Implied contracts by mortgagor.—Sec. 65 of the T. P. Act mentions the covenants running with the mortgage. They are:—In the absence of a contract to the contrary the mortgagor shall be deemed to contract with the mortgagee—(a) **covenant for title**—that the *interest* which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has *power to transfer* the same ;

(b) **Covenant for defence of title**—that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto ;

(c) **Payment of public charges**—that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property ;

(d) **Payment of rent etc.**—Where the mortgaged property is a lease, that the mortgagor has upto the time

of the mortgage, paid the rents and performed and observed the conditions in the lease, and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, do the same and in case of his default he will indemnify against all the claims arising therefrom.

(e) Covenant for payment of prior incumbrances—Where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on such prior incumbrance as and when it becomes due, and will, at the proper time discharge the principal money due on such prior incumbrance.

Covenants run with the land—The benefits of the contracts mentioned above are not personal to the mortgagee but will enure for the benefit of the holders of the whole or part of his interest.

Ques. What are the conditions under which a mortgagor in possession can grant a lease of the mortgaged property during the continuance of the mortgage so as to bind the mortgagee by the same? (Bom. 1935)

Ans—Mortgagor's power to grant lease:—Before the insertion of the new Sec. 65-A by the Amendment Act of 1929—there was no provision in the T. P. Act authorising the mortgagor in possession to grant a lease of the mortgaged property which would be binding on the mortgagee, and therefore there was diversity of opinion among the High Courts of Allahabad and Calcutta (2 A. L. J. 294 and 40 C. L. J. 500). Accordingly this new section has been incorporated providing that a mortgagor while lawfully in possession of the mortgaged property shall, subject to

express conditions in the mortgage deed, be entitled to grant a lease of the mortgaged property which shall be binding on the mortgagee. The following restrictions have been made in order to protect the interests of the mortgagee:—(a) The lease should be one that can be made in the ordinary course of management and in accordance with any local law, custom or usage. (2) The lease should reserve the best possible rent, and no premium or rent should be paid in advance. (3) There should be no covenant for renewal. (4) The lease should take effect within six months of its execution (5) The lease if of buildings, with or without the soil, should not be for a term exceeding three years, and it should contain covenant for payment of rent and in default of payment for a certain period, for re-entry.

The whole section is subject to contract between the parties and its terms and conditions may be varied or widened by stipulation between the parties contained in the deed of mortgage.

But though under clause (5) a lease for more than three years may be invalid still as between the mortgagor and his tenant, the tenancy will be valid until a suit for ejectment has been brought by the mortgagee, and the tenant will be estopped from disputing his landlord's title on the ground of invalidity of the lease. See *Rustomji v. Keshavn*, 28 Bom L. R. 1162.

Rights and Liabilities of Mortgagee.

Ques. What are the rights of a mortgagee? (Cal. 1921)

Ans —Rights of foreclosure or sale—"In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage money has become due to

him, and before a decree for redemption has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as herein-after provided, a right to obtain from the Court a *decree* that the mortgagor shall be absolutely debarred of the right to redeem the property, or a *decree* that the property be sold.

A suit to obtain a *decree* that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure."

Under Sec 67 the mortgagee has therefore two rights (1) of foreclosure, and (2) of sale. By means of *foreclosure* the mortgagee constitutes himself the absolute owner of the property; by means of *judicial sale* he realises the actual value of the property in money.

Ques. What is "a suit for foreclosure" and when may it be brought? In what cases is a mortgagee unable to foreclose the mortgage? (Bom. 1935).

*Ans:—*A suit to obtain a *decree* that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure, and it may brought when the time fixed for repayment of the mortgage money has expired and the mortgagor's right to redeem has become complete and he has failed to avail himself thereof.

A mortgagee is unable to foreclose in the following cases :—

(1) When he is a simple mortgagee (2) when he is an usufructuary mortgagee as such (3) when he is an English mortgagee; (4) when he is an equitable mortgagee; (5)

when his rights as mortgagee are in the hands of the mortgagor as his trustee or legal representative and who may sue for sale of the property ; (6) when he is a mortgagee of a railway, canal or other work in the maintenance of which the public are interested (7) when he is interested in part only of the mortgage-money he cannot institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interest under the mortgage. (S. 67).

Ques. What is the nature of the interest transferred in the different kinds of mortgages ? What are the remedies open to a mortgagee in the different kinds of mortgages. (Cal. 1915, 16).

*Ans:—*Nature of interest transferred. According to the definition given in Sec. 58 T. P. Act the first requisite of a mortgage is that there should be a transfer of an interest in immoveable property. The interest transferred depends upon the conditions of the mortgage. In a simple and equitable mortgage, the interest conveyed is the right to cause the property to be sold. In a mortgage by conditional sale and in an English mortgage, the actual ownership is transferred, subject, however, to a condition. In an usufructuary mortgage, the transfer made is of the right of possession and enjoyment of the usufruct.

Remedies to the mortgagees in respect of the several classes of mortgages.

The following remedies are given in clause (a) of Sec. 67.

(a) Simple mortgage ;—Remedy by sale, and not by foreclosure.

(b) Mortgage by conditional sale :—Foreclosure and not sale.

(c) Usufructuary mortgage :—No foreclosure or sale.

(d) English mortgage :—Sale only, and not foreclosure. Under the old sec. the remedy was both.

(e) Equitable mortgage :—Sale only, and not foreclosure. An equitable mortgagee can apply for the appointment of a receiver—A. I. R. 1932 Pat. 360.

(f) Anomalous mortgage :—Ordinarily sale; foreclosure allowed, if it is allowed by the terms of the mortgage.

Ques. When is a mortgagee bound to bring one suit on several mortgages ?

Ans. :—Mortgagee when bound to bring one suit on several mortgages. Prior to the enactment of sec. 67-A by T. P. Amendment Act of 1929, there was a conflict of opinion as to whether a mortgagee holding several mortgages executed by the same mortgagor was compellable to sue on all mortgages at one and the same time. [30 Bom. 156. 30 Mad. 353. 20 All. 332. 25 C. W. N. 129.]. To avoid the divergence of views the present section has been enacted which runs thus—“A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages shall, *in the absence of any contract to the contrary*, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.” The reasons which induced the Legislature to the enactment of this section were that if a person holds several mortgages on the same property, and if he is

entitled to foreclose in respect to one of them, he will possibly appropriate the property for a nominal amount due under that mortgage and follow the mortgagor's person in respect of the other mortgages; or if he has the right of sale the effect will be that property cannot be sold for an adequate price inasmuch as the property being necessarily sold subject to his other mortgages will scarcely attract any purchaser. The rule of this sec. (67-A) is not applicable where the parties in the two mortgage-deeds are not the same. This section also has no retrospective effect

Ques. When does a mortgagee get a right to sue the mortgagor for mortgage money ? (Adv. 26, 34. Cal. 1928, 35)

*Ans:—*Right to sue for mortgage-money.

(1) The mortgagee has a right to sue for the mortgage money in the following cases *and no others*, namely:—

(a) Where the mortgagor binds himself to repay the same;

(b) Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed, or the security is rendered insufficient within the meaning of Sec. 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient and the mortgagor has failed to do so;

(c) Where the mortgagee is deprived of the whole or part of this security by or in consequence of the wrongful act or default of the mortgagor;

(d) Where the mortgagee being entitled to possession of the mortgaged property the mortgagor fails to

deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor :

Provided that in the case referred to in clause (a), a transferee from the mortgagor or from his legal representatives shall not be liable to be sued for the mortgage money.

(2) Where a suit is brought under clause (a) or clause (b) of subsection (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, retransfers the mortgaged property. (Sec. 68)

Ques. When and under what circumstances can a mortgagee sell the mortgaged property without the intervention of the Court and what is the position of the purchaser in such a case ? (Adv. 1926, 28 All. 1924.)

*Ans:—Power of sale when valid:—*The circumstances under which a mortgagee can sell the mortgaged property without the intervention of the Court are laid down in Sec. 69 T. P. Act as follows—

“(1) Notwithstanding anything contained in the Trustee’s and Mortgagee’s Power’s Act, 1866, a mortgagee, or any person acting on his behalf, shall, subject to the provisions of the section, have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage money,

without the intervention of the Court, in the following cases and in no others, namely—

(a) Where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mahomedan, or Buddhist, or a member of any other race, sect, tribe, or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor-General in Council, in the local official Gazette;

(b) Where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgagee is the Secretary of State for India in Council;

(c) Where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgage property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the town of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab or in any other town or areas which the Governor-General in Council may by notification in the Gazette of India, specify in this behalf.

(2) No such power shall be exercised unless and until:—

(a) Notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or part thereof, for three months after such service, or,

(b) Some interest under the mortgage amounting at least to five hundred rupees, is in arrear, and unpaid for three months after becoming due.”

Position of the Purchaser. When a sale has been made in professed exercise of such power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power, shall have his remedy in damages against the person exercising the power.

Though a sale is not impeachable by the mortgagor on the mere ground that the power was improperly exercised, still this protection does not extend to cases where the purchaser had *notice* of the improper exercise of the power to the sale of the property—*Chabildas v. Dayal* 6 Bom. L. R. 557; or where the power of sale was exercised in a *fraudulent* or improper manner contrary to the terms of the mortgage—*Jagvan v. Sridhar*, 2 Bom. 522, or if the property is purchased by the mortgagee himself *benami*, the sale is void—*Vallabhadas v. Pranshankar* 30 Bom. L. R. 1519.

Ques. Under what circumstances can a power of sale be validly introduced in a deed of mortgage? (Cal. 1925).

*Ans:—Power of sale—*The power of sale contemplated in the above question is a power to sell *without* the intervention of the Court whereas the power conferred by sec. 58 (b) in a simple mortgage is a power to 'cause the mortgage property to be sold' i. e. to have the property sold *through* the intervention of the Court. A simple mortgagee cannot sell the mortgaged property privately, unless the mortgage deed expressly empowers him to sell it without the intervention of the Court and even he can sell only under the circumstances enumerated in clause

(e) when the mortgaged property is a renewable leasehold, for the renewal of the lease.

(f) when the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure the property; and may in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent per annum.

Provided that the expenditure of money by the mortgagee under clause (b) or (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title. (S. 72).

Clause (a) of the old Sec. 72 which related to the management of the property applied only to mortgagee in possession. It was found inequitable and against the decided cases (I. L. R. 30 Cal. 794 and 25 Bom, L. R. 843). to confine this section to a mortgagee in possession, so the said clause (a) is omitted from Sec. 72 and taken to Sec. 76 which deals exclusively with the mortgagee in possession. The effect of this is that now the section applies to all mortgagees alike.

(2) Yes, a mortgagee may spend such money as is necessary for the purposes mentioned above in Sec. 72 and he may recover it from the mortgagor over and above the amount secured by the mortgage with stipulated interest.

Ques. What are the duties and liabilities of a mortgagee in possession? (Bom. 1926, 29, 34, Adv. 26, 29, 31, 32)

*Ans:—*Liabilities of Mortgagee in Possession—
When during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property.

(a) he must manage the property with ordinary prudence;

(b) he must collect the rents and profits;

(c) he must, in the absence of a contract to the contrary, pay Govt. revenue and other charges of a public nature *and all rent* out of the income of the property;

(d) he must, in the absence of a contract to the contrary, make such necessary repairs if the income of the property permits it.

(e) he must not commit any active waste.

(f) he must apply any money which he receives under the policy in re-instating the property, or if the mortgagor so directs, in reduction or discharge of the mortgage money.

(g) he must keep clear, full and accurate accounts and give the mortgagor at his request true copies of such accounts.

(h) he must debit the money received from the property, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and all other expenses mentioned in classes (c) & (d) + interest thereon, first against the interest and then against the principal;

(i) he must account for his receipts from the mortgaged property, when the mortgagor tenders or deposits the due amount, and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time when he could take such amount out of the Court as the case may be. (Sec. 76).

Ques. What is a 'sub—mortgage'? What are the rights of a sub-mortgagee?

Ans:—Sub-mortgage:—In ordinary parlance, the term 'sub-mortgage' is often used as synonymous with a puisne mortgage, but the two are really different. Puisne mortgage means a second or subsequent mortgage executed by the mortgagor; but a sub-mortgage is a "mortgage of a mortgage", i. e. a mortgage executed by the mortgagee of his security under the original mortgage. A mortgage may be transferred by the mortgagee to some creditor of his own by way of mortgage; such a mortgage of a mortgage is known as "sub-mortgage".

The sub-mortgagee cannot recover anything more than the amount due to the original mortgagee from the original mortgagor, whatever may be the state of account between himself and the original mortgagee. The original mortgagor is entitled to sue the sub-mortgagee for redemption, and conversely the latter may sue the former for recovery of his money out of the mortgaged property.

The sub-mortgagee, by virtue of his assignment is not only entitled to the usual remedies against his mortgagor (i. e. the original mortgagee) but is also entitled to a remedy against the original mortgagor; the position of the original mortgagee after the sub-mortgage becomes that of a surety, the sub-mortgagee becomes the creditor and the original mortgagor continues to remain the debtor.

A payment of the mortgage-debt by the original mortgagor, *without notice* of the sub-mortgage, to the original mortgagee extinguishes the sub-mortgage—*Maung Shan v. U. Po*, A. I. R. 1928 Rang. 30. But the substitution of the original mortgage by a new one did not extinguish the sub-mortgage and therefore the sub-mortgagee was entitled to bring the mortgagee's interest under the earlier mortgage to sale—*Chakrapan v. Laxmi* 35 M. L. J. 309.

Priority.

Ques. In what cases is a prior mortgagee postponed to a subsequent mortgagee of the same property? (Bom. 27, Adv. 26, 31 Cal 25, 26).

Ans:—Postponement of prior mortgagee.—Sec. 78, T. P. Act lays down the circumstances under which a prior mortgagee is postponed to a subsequent mortgagee, viz. “where through fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee” This section is an exception to the equitable maxim *qui prior est tempore potior est jure* (he who is prior in time is stronger in law) enunciated in Sec. 48 T. P. Act. The principle of this section is that the Court would postpone the prior legal estate to the subsequent equitable estate where the owner of the legal estate had assisted in or connived at the fraud which had led to the creation of a subsequent equitable estate without notice of prior legal estate. The section mentions cases in which the priority may be postponed viz: when the prior transferee is guilty of (1) fraud (2) misrepresentation; and (3) gross negligence. These are three different kinds of conduct and are in no way coextensive. Misrepresentation does not necessarily mean *fraudulent* misrepresentation, just as gross negligence does not mean negligence amounting to fraud. *Shan Maun Mull v. Madras Buildings Co.* 15. Mad. 268.

Ques. How does notice affect the position of prior and subsequent mortgages?

*Ans:—*Under Sec. 79 T. P. Act, the intermediate mortgagee having notice of the prior mortgage is postponed so far as regards further advances which are subsequently made on the security of that mortgage, provided in expresses the maximum to be secured thereby and that maximum is not exceeded. The priority which under this section may be acquired in respect of subsequent advances depends upon the fact that the second mortgagee over whom priority is gained had notice of the prior mortgage. If he had not notice of such mortgage, then the case will be decided according to the general principle of priority viz who is prior in time is better in law, as enunciated in Sec. 48 T. P. Act. Under Sec. 79, the prior mortgagee making the subsequent advances does not lose his priority in respect of such advances by reason of the fact that he did so with notice of the intermediate mortgage: In other words, the question whether the prior mortgagee had, at the time of making the further advances, notice of the second mortgage, is immaterial. This section thus forms an exception to the rule stated in Sec. 93 under which a mortgagee making a further advance does not in respect of that advance acquire, any priority as against an intermediate mortgagee.

Ques. Explain and illustrate the doctrine of Marshalling of Securities; who can exercise that right and against whom? (Bom. 1927, 28; Adv. 1924 Cal. 30, 33. All. 25, 26).

Ans:—Marshalling of Securities.—Section 81 T P. Act deals with the marshalling of securities. The doctrine is laid down thus, " If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary

entitled to have a prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties."

The principle of the doctrine of Marshalling has been thus stated in an English case: "If there are two creditors who have taken securities for their respective debts, and the security of the one is confined to both and the security of the other is confined to one of those funds, the Court will arrange or marshal the assets so as to throw the person who has two funds liable to his demand on that which is not liable to the debt of the second creditor i. e. that it shall not depend upon the will of one creditor to disappoint another. Thus where two properties X and Y were mortgaged to A and afterwards X was mortgaged to B, it was held, that B was entitled to have the securities marshalled, so as to throw A's mortgage in the first instance on Y.

Who can exercise that right and against whom :—
The benefit of this section can be claimed not only by the subsequent mortgagee but also by a purchaser of the property in execution of the mortgage decree obtained by the subsequent mortgagee.

The benefit of this section cannot be claimed by a lessee. The doctrine also cannot be extended to a case where *only a portion* of the property already mortgaged is subsequently sold or mortgaged. No marshalling ought to be enforced unless the parties between whom it is enforced are creditors of the *same* person, and have demands against the property of the same person i. e. *the debtor must be the same*. Under the present amended:

section a subsequent mortgagee can marshal the securities even though he has notice of the prior mortgage. The rule of marshalling should not be so applied as to prejudice the rights of the *prior* mortgagee or of any other person who has for consideration acquired an interest in any of the properties—*Chunilal v. Fulchand* 18 Bom. 160.

Ques. Which will prevail when there is a conflict between Marshalling and Contribution? (Cal. 29, Mad. 1915).

Ans.—Marshalling and contribution are based on the same equitable principle that the benefit and liability of the transaction should go hand in hand i. e., one should not be allowed to derive benefit without incurring liability that is associated with it or enjoy benefit to the prejudice of another when he can help it. The last para of Sec. 82. T. P. Act, however, declares that the right of contribution shall be subject to the rule of marshalling. That is, where these two rights conflict, marshalling is to prevail, e. g. properties X and Y are separately mortgaged to B and C and then mortgaged together to D and afterwards X is mortgaged to E. Here E has the right to compel D to resort to property Y in the first instance (Sec. 81). On the other hand (under Sec. 82) the two properties X and Y are liable to contribute to the debt secured by them rateably, and it might conceivably be to the advantage of a person interested in the equity of redemption to have the debt so apportioned, with the result that E's security might diminish, under such circumstances marshalling overrides contribution.

Ques. Explain briefly the Doctrine of Contribution in the law of mortgage. (Bom. 1925, 26 Cal. 21, 30, All. 1925, 26).

Ans:—Doctrine of contribution .—To put the doctrine of contribution in a nutshell it is this. Several properties mortgaged to secure one debt are liable to contribute to that debt rateably in proportion to their values at the date of the mortgage and the amount of previous mortgage or charge being deducted. In view of the recent amendment, the rule of contribution applies not only where several properties are mortgaged and the owner of one of them is compelled to satisfy the whole mortgage debt, but it also applies where only one property held by several co-owners is mortgaged and the portion of one co-owner is made to satisfy the mortgage

The principle of the doctrine is that law requires equality i. e. where a property which is equally liable with other property to pay a debt shall not escape, because the creditor has been paid out of that other property alone. But a claim for contribution cannot arise until the whole of the mortgage debt has been satisfied—*Ibu Hasan v. Brijbhushan*, 26 All. 407 (F. B.). The mortgaged properties are liable to contribute rateably to a mortgage debt only in the absence of a contract to the contrary. The words “contract to the contrary” mean a contract between the mortgagor and mortgagee and not between the mortgagor and his vendor or between the mortgagors.

The second para of Sec. 82 T. P. Act is only an illustration of the rule contained in the first para describing the mode of calculation of the contribution. The following example would serve as illustration—The estates X and Y (the values whereof are Rs. 1000 and 800 respectively) are mortgaged to D for Rs. 1000, X having been previously mortgaged to C for Rs. 200; X and Y are sold to E and F respectively. In this case we see that X and Y become equal after deducting Rs. 200 from Rs. 1000 (the original value of X) therefore E and F will have to pay

Rs 500 each to satisfy the mortgage debt. To arrive at the value for contribution purposes of each of several properties on which a particular mortgage is secured, the amount of all prior encumbrances upon such properties must be ascertained and deducted—*Fakir Chand v. Aziz Ahmad*. 34 Bom L. R. 760.

Deposit in Court.

Ques. At what time can a mortgagor deposit in Court money due on a mortgage? What are the consequences of such a deposit? (Bom. 1926.)

Ans.—Deposit in Court.—“At any time after the principal money payable in respect of any mortgage has become due, and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount due on mortgage”. Sec. 83.

The deposit must be unconditional and of the full amount due—principal plus interest and any sum spent under Sec. 72.

Consequences of such a deposit—The making of a deposit under this section provides a summary procedure for redemption but it does not *ipso facto* extinguish the mortgage where the mortgagee has *refused* to accept the deposit. The parties remain in the relationship of mortgagor and mortgagee to each other.

Another effect of a deposit is that as soon as a deposit is made, interest ceases on the mortgage from that date only when the mortgagor has done all that has to be done

by him to enable the mortgagee to take such amount out of Court and the notice of deposit has been served on the mortgagee. (Sec. 84).

A third effect of a deposit is that the mortgagee in possession is liable to the mortgagor to account for all the receipts and profits received by him under Sec. 76, from the date of deposit.

Ques. What are the requisites of a valid tender? (Bom. 1934. Adv. 1933).

Ans —(1) A tender to be valid must be made to the party entitled or to a properly authorised agent on his behalf.

(2) The tender must be made at the mortgagee's place, if no particular place is specified in the mortgage-bond.

(3) A mere offer by letter on notice expressing willingness to pay the mortgage-money is not sufficient.

(4) A tender should ordinarily be made in current coin. A tender by cheque is not a legal tender but if it is once accepted, then the payee is bound by it unless it is dishonoured.

(5) A tender cannot be made by a set-off.

(6) The tender should be of the whole amount due on the mortgage.

(7) A tender is not vitiated because a receipt is asked for it.

Effect of tender.—A mortgagee who refuses a valid tender does so at his risk, and the risk which he incurs is twofold namely in the first place, he has to account for all the receipts from the mortgaged property from the

date of tender (Sec. 76 cl. i) and in the second place, interest ceases to run on the principal money from the date of tender. A subsequent mortgagee seeking to redeem a prior mortgage can take advantage of the tender made by the mortgagor to the prior mortgagee, and so would not be liable to pay any interest for the period subsequent to the date of such tender—*Chettyar Firm v. Chettyar Firm* A. I. R. 1930 Rang. 255.

Ques. What persons besides the mortgagor are entitled to redeem a mortgage? (Bom. 1926, 33. Adv. 32 Cal. 1933, 34, 35).

Ans:—Who may redeem.—Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of the mortgaged property, namely:—
(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged, or in or upon the right to redeem the same;

(b) any surety for the payment of the mortgage—debt or any part thereof; or

(c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property. (Sec. 91).

The person claiming redemption must prove that he has an interest in or charge upon the property, even the smallest interest in or charge upon the property, even the smallest interest in the equity of redemption will entitle a person to redeem the entire property—(*Shankar v. Bhukaj* 53 Bom. 353). The interest referred to is a present interest, and so a person who has absolutely no present interest at all, e. g. a *reversioner* is not entitled to redeem during the life-time of the widow. A sub-mortgagee is entitled to redeem. As an attachment does not create any

interest such as a charge or lien in the property attached, therefore the right of the judgment creditor to redeem under the old clause (f) of sec. 91 has now been taken away; and clauses (d) and (e) from the old section have now been omitted as superfluous.

Ques. Explain the following:—"Redeem up, Foreclose down". (Bom. 1926, 28, 31, 35. Adv. 1924, 25, 27. Cal. 25, 28, 33. All. 25, 27).

*Ans:—Redeem up; Foreclose down:—*A mortgagor can create a number of mortgages successively on the same property. By the first mortgage the mortgagor transfers certain fragments of his right of ownership; that which he retains after the first mortgage is the *Equity of Redemption*. This Equity of Redemption being an interest in immoveable property can be transferred by way of mortgage several times in succession. By each succeeding mortgage he transfers this right to redeem to the next preceding mortgagee, himself retaining the right to redeem such puisne or subsequent mortgagee. Each subsequent mortgagee thus steps into the position of his mortgagor with respect to and has therefore the right to redeem, the mortgage next preceding his, for it is the right to redeem that mortgage that has been transferred to him by his own mortgage. Then again, as each subsequent mortgagee has the right to *redeem up* i. e. redeem the prior mortgagee, so has each prior mortgagee the right to *foreclose down* any puisne mortgagee for as against the subsequent mortgagees he has the same rights as he has against his own mortgagor.

It is this right of puisne mortgagees to redeem the prior mortgages and foreclose the subsequent mortgagees that is summed up in the maxim "*Redeem up, Foreclose down.*"

Ques. What is meant by "opening the foreclosure"? When does it happen? (Adv. 28).

Ans —Opening the Foreclosure :—In India, on the passing of a final decree for foreclosure the debt secured by the mortgage shall be discharged (vide Order 34 rule 3 C.P.C.) The mortgagee-decree holder must thus be content with the property which was the security for the mortgage.

In England, however, the debt is not necessarily discharged by foreclosure so that if the mortgagee obtained a foreclosure first, and then the value of the estate proves insufficient to satisfy the mortgage-debt, he may still sue on the personal covenant (which in every legal mortgage either exists or is implied), but by doing so, he gives the mortgagor renewed right to redeem, or as it is put, *the foreclosure is reopened*.

On a somewhat similar principle as the one underlying the aforesaid view of English law, it has been held in India that the holder of two mortgages cannot foreclose the first mortgage and then be allowed to sue the mortgagor personally for the debt due upon the second mortgage—4 Cal. 475. The Bombay High Court has held that the mortgagee cannot foreclose his first mortgage without treating the entire mortgage-debt as satisfied and that if in the first suit, the mortgagor omits to plead that the plaintiff cannot foreclose except upon the abandonment of his second mortgage, he cannot be deprived of his right to insist that the mortgagee should either be precluded from suing on the second debt, or that the foreclosure should be reopened—*Bapuraoji v. Ramji* 11 Bom. 112.

Ques. Enunciate the equitable right of Subrogation. Who is entitled to invoke such a right and under what circumstances? (Bom. 1932 Cal. 1924).

Ans :—Subrogation :—Section 92 T. P. Act (old sec. 74) enacts the rule of subrogation thus—“ Any of the persons referred to in Sec. 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. The right conferred by this section is called the right of subrogation.”

Persons who are entitled to the right.—Subsequent mortgagee.—A subsequent mortgagee can redeem a prior mortgage without redeeming an intermediate mortgage and can acquire the rights of the prior mortgagee *as mortgagee*. If the money advanced by the subsequent mortgagee does not fully pay off the prior mortgage, he cannot be subrogated to the right of the prior mortgagee. Such partial payment would only have the effect of giving fresh life to the prior mortgage.—*Brijmohan v. Dukhan* A. I. R. 1931 Pat. 33. There can be no subrogation when a person simply performs his own obligation or covenant. For example, where a subsequent mortgagee pays off a prior mortgage at the mortgagor's request or out of the money left with him by the mortgagor for the purpose, his payment would not be *qua* mortgagee, but as the agent of the mortgagor, and he cannot claim to be subrogated to the rights of the mortgagee so paid off.—*Shafiquallah v. Samullah*, A. I. R 1929 All. 943.

Surety—A surety is entitled to be subrogated to the rights of the creditor if he pays him off.

Co-mortgagor.—The redeeming co-mortgagor is subrogated to the rights of the mortgagee.

Payment by a third person.—when a third party, who has no interest to protect, advances money to a

mortgagor under the agreement that he would be subrogated to the rights and remedies of the creditor; and the agreement is reduced in writing and registered, such a person shall be subrogated to the rights of the mortgagee. Subrogation in this case may be called *conventional* as distinguished from *legal* as the person who pays off the debt has no interest to protect.

The right of subrogation is not extended to mere volunteers who pay off other people's debts without having any concern in them. A. I. R. 1929 Mad. 860.

The rights of subrogation shall not be claimed unless the mortgage in respect of which the right is claimed has been redeemed in *full*.

Ques. "Marshalling and Subrogation are both intended to effect the same object but in different ways." Explain and illustrate. (Bom. 1933, Adv. 32.)

Ans.—Marshalling and Subrogation are closely allied to each other. Thus, for example, properties X and Y are mortgaged to A and then X is mortgaged to B; here B can compel A to resort to property Y in the first instance. This is marshalling. But if A satisfies his claim out of property X, B will be entitled to be subrogated in the place of A, for then, the sum obtained by A (out of X) for his satisfaction will be deemed to have been obtained from B. By reason of this fiction of B's subrogation to A's rights B gets from property Y what he loses in property X. By marshalling we keep aloof X for B; or by subrogation, we make up B's loss in X by gain in Y. Therefore, we see that subrogation restores matters to their original condition and thereby achieves the same object as marshalling would have done though in a slightly

different way ; or in other words, marshalling is subrogation in another shape.

Ques. Explain the doctrine of Tacking of mortgages. How far has it been recognised in Indian law ? (Adv. 1922, 32 Cal. 28, 34).

Ans:—Tacking Where there are three mortgages over the same property, and first of which is legal, and the third mortgagee had, at the time of his mortgage, no notice of the second one the third mortgagee could by paying off the first one and obtaining a conveyance of the legal estate from him, unite the two securities and insist on being paid such aggregate amount before the second mortgagee is paid, so as to give the third mortgagee priority over the second and thus “squeeze out” the second mortgagee. This doctrine is called *tacking*. This English doctrine of tacking has been held not to be applicable to this country but that the obligation arising out of the successive mortgages should be discharged in the order of their date—*Narayan v. Pandurang* 7 Bom. 526.

Sec. 93 (old Sec. 80) T. P. Act has been enacted with the object of prohibiting the English form of tacking, it expressly declares that by the mere payment of a prior mortgage, whether with or without notice, a subsequent mortgagee does not acquire for his subsequent mortgage any priority over any other mortgage, except in the case provided by Sec. 79 i. e. except where the mortgage expresses maximum to be secured thereby.

Ques. Distinguish between Tacking and Consolidation. (Mad. 1913).

*Ans:—Consolidation and Tacking:—*The points of distinction are .— Tacking is the union of several debts upon one estate; consolidation is the union of several

debts respectively charged on several estates. (3) The maxims on which the two doctrines came to be introduced are different e. g. the former is based on the maxims "He who seeks equity must do equity" and the latter is founded on the principle "where the equities are equal, the law shall prevail."

(3) Tacking did not affect the mortgagor. It affected priority between intervening mortgagees. Consolidation affects the mortgagor. (4) In tacking the question of notice is important. In consolidation, it is not.

The doctrines of tacking and consolidation have not been allowed in India vide Secs. 93 and 61 T. P. Act. Even in England as a consequence of the Law of Property Act 1925, tacking will exist to a limited extent e. g. (1) when further advances have been made by the first mortgagee without notice of the subsequent mortgagees.

Charges.

Ques. Define "Charge." How can it be effected? Give illustrations. (Bom. 25, 27. Cal. 27).

*Ans:—*Charge defined—"Where immoveable property of one person is by act of parties or operation of law, made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."

A charge can be created (1) by act of parties or (2) by operation of law.

Requisites of a Charge by act of parties.—
(1) A charge does not contemplate any *transfer of an interest* in the immoveable property. (2) The property should be *specified* and that it should be made *security* for the payment of money. (3) In order to constitute

a charge the form of words used is immaterial, it is not necessary to use any technical terms—*Nathan v. Durga*, A. I. R. 1931 All. 62.

(4) A charge must be created in favour of a *particular person* specifically named.

(5) A charge may be created *orally*, although if it is created by an instrument in writing it must be registered, unless made by a will or the amount secured is less than one hundred rupees.

(6) A charge cannot be created on a future contingency—*Mohini v. Purna Sashi* A. I. R. 1932 Cal. 451.

Charge by act of parties—Instances:—It is created by an instrument *inter vivos* or by will. Thus, (1) a document stating. "I have willingly fixed an annual allowance of Rs. 100 in cash in perpetuity out of the profits of the said village for my eldest brother" creates a valid charge—5 All 11. or (2) A will devising immoveable properties and directing the devisee to pay certain debts of the testator from these properties creates a charge in them in respect of these debts—15 Cal. 66 (P. C.)

Charges by operation of law—Instances:—These charges are founded upon the consideration of duty or implied intention on the part of the owner of the property to make it answerable for a specific claim. *Instances.*—(a) A Hindu widow's charge on the family property for her maintenance, if created by a decree (see Sec. 39). (b) Vendor's charge for unpaid purchase-money—Sec. 55 (4). (c) A party entitled to claim contribution under Sec. 82 acquires a charge in respect thereof. (d) Sec. 228 of the Calcutta Municipal Act makes the consolidated rate as it accrues from time to time a charge on the property.

Ques. State the cases in which no charge is acquired. (Bom. 1925).

Ans:—Cases in which no charge is created:—A co-sharer who has paid the whole revenue and thus saved estate from sale does not, by reason of such payment, acquire a charge on the shares of other Co-sharers.—14 Cal. 809, 14 All 273, 26 Bom. 437. The Madras High Court, however holds that such payment creates a charge—36 Mad. 493. An oral charge created on immoveable property though prior in point of time does not avail against the subsequent mortgage effected on the property without notice of the charge. The amendment made in S. 100 by act XX of 1925 has no retrospective effect *Chhaganlal v. Chumalal* 36 Bom. L. R. 277.

Where one co-heir takes upon himself to save the property of the deceased from Court sale in execution of a decree passed against all the co-heirs, no charge is created in favour of the co-heir making the payment, especially when the payment is made without the knowledge or consent of the other co-heirs—A. I. R. 1928 Rang 278.

Ques. Distinguish a charge from a mortgage. (Bom. 1925, 27, 31, 33, Adv. 30, 32, 34, Cal. 27, 31, 32 All. 27).

Ans:—Mortgage and charge distinguished.

(1) A mortgage is a *transfer* of interest in the property subject thereto but charge is not.

(2) A mortgage can be created only by act of parties while a charge may be created by act of parties or by operation of law.

(3) A mortgage is a security for the payment of a *debt*, a charge is a security for the payment of *money*, such money may be a debt or may be by way of a claim.

(4) A mortgagee can follow the mortgaged property in the hands of any transferee from the mortgagor irrespective of notice, while a charge-holder cannot follow a *bona-fide* purchaser for value without notice, whether the charge is created by act of parties or by decree of Court. This is made clear by the Amendment Act 1929 because there was difference of opinion between the High Courts.

(5) A mortgage presupposes *specific* property existing at the date of transfer, but a charge may relate to unspecified property.

(6) A charge does not require the formalities (e. g. registration) prescribed by sec. 59 for a mortgage. To create a valid charge no writing is necessary, but if there be a writing it must be registered.

(7) An oral charge created on immoveable property though prior in point of time does not avail against a subsequent mortgage effected on the property without notice of the charge—*Chhaganlal v. Chunilal* 36 Bom. L. R. 277.

As a charge resembles a simple mortgage more than any other kind of mortgage, there is now no distinction between a charge and a simple mortgage as regards the relief granted.

Ques. Distinguish a charge from a lien.
(Bom. 1925, 27)

Charge and lien distinguished :—

Ans —(1) A 'charge' may be created by act of parties or by operation of law, whereas a 'lien' can arise only by operation of law.

(2) A 'charge' in strictness not only empowers its possessor in many cases to hold the property charged,

if in his possession, but also gives him the right to come into court and sue actively for the satisfaction of his claim. A 'lien' strictly is neither a *jus in rem* nor a *jus ad rem*, but is simply a right to possess and retain property until some charge attaching to it is paid or discharged.

(3) A 'charge' is confined to immoveable property; but a lien may be had in respect of moveables also.

Ques. Can an instrument intended to be mortgage, but failing for want of a formality, be held to operate as a charge? (Cal. 26, 27, 32, 34)

*Ans:—*Under the English law, when a mortgage fails for want of some formality, the transaction may be valid as an equitable charge. But in India the words "and the transaction does not amount to a mortgage" in sec. 100 T. P. Act. signify that if the relation created by the instrument is not that of a mortgagor, and mortgagee and immoveable property has been made security for the payment of money, there is a charge on the property; the words do not mean that if the transaction on the face of it purports to be a mortgage, but the instrument is not operative *as such* by reason of law, the transaction is converted into a charge. Therefore, an instrument which cannot operate as a mortgage for want of due attestation or registration as required by sec. 59, does not operate as a charge. An equitable mortgage by deposit of title deeds is invalid if it is not executed in any of the specified towns, and it cannot operate even as a charge under Sec. 100—28 Mad. 54. Sec. 100 was never intended to indemnify people who endeavour to get conveyances in violation of express provisions of law.

Ques. Discuss whether the purchaser or mortgagee of the equity of redemption paying off a prior incumbrance is entitled as against intermediate incumbrance, to stand in the place of the incumbrancer paid off.

Ans:—Under the old Sec. 101 T. P. Act, it was stated, that if a mortgagee or the charge holder of property acquired the interest of the mortgagor or the owner, his own mortgage or charge was extinguished, *unless he declared by express words or necessary implication that the charge should continue to subsist or such continuance would be for his benefit.* This was based on the rule laid down in *Toulmin v. Steere*, in which it was held that the purchaser of an equity of redemption with notice of subsequent incumbrances stands in the same situation as if he himself had been the mortgagor, and cannot set up against such subsequent incumbrances either a prior mortgage of his own or a mortgage which he may have paid off. But in spite of the express words in Sec. 101 and in spite of the rule laid down in *Toulmin v. Steere* it was held in majority of cases that in such cases the Court would presume that it was to the benefit of the mortgagee to keep the charge alive and that the mortgagee intended to keep it alive, and thus come in before a later mortgagee—*Malwaddi Ayyreddy v. Gopal Krishnaya*, 47 Mad. 190 (P. C.) The Legislature has accordingly felt that, as in America, it should be expressly enacted that there should be no merger in the event of a subsequent mortgage or incumbrance remaining outstanding, and provision has accordingly now been made in the present section. Under the amended section, the purchase by the mortgagee of the equity of redemption has in itself the effect of keeping alive the prior mortgage, and the intention to do so need not be proved nor presumed.

Chapter V

Of Leases of Immoveable Property.

Ques. Define lease. (Bom. 26, 28, 30, 32 Cal. 28, 30, 31.)

Ans:—"Lease defined":—A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions, to the transferor by the transferee who accepts the transfer on terms." (Sec. 105).

Ques. Point out the distinction between a lease and a license. (Bom. 1926, Adv. 1930, 31 ; All. 1927).

Ans:—Lease and License distinguished :—A license may be defined as "a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would in the absence of such right be unlawful, and such right does not amount to an easement or an interest in the property." (Sec. 52 Easements Act).

Thus the cardinal distinction between a lease and a license is that in a lease there is a *transfer of interest* in land, whereas in the case of a license there is no transfer, of interest, although the licensee acquires a right to occupy the land.

(2) The right of the lessee is good against all the world while the licensee cannot bring an action for trespass against a stranger.

(3) The lessee's interest is transferable as well as heritable but the licensee's right is not so.

(4) A lease cannot be determined before its time except by mutual agreement, while a license is revocable at pleasure.

(5) The death of either parties does not affect a lease but terminates a license.

Ques. How are leases made and what is the extent of their duration when there is no written contract of lease? (Cal. 15, 28, 30).

*Ans:—*Lease how made —“A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument.

All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immoveable property is made by a registered instrument, such instrument or, when there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee.” (S. 107).

Sec. 117 makes this Chapter inapplicable to leases for agricultural purposes. Consequently, the letting out of agricultural land need not be by a document only ; it may be by oral agreement or even by conduct of parties. A lease is essentially a bilateral contract hence a lease by a minor is void—*Govinda v. Chowakkaran* A. I. R. 1931 Mad. 147.

Duration of leases :—In the absence of a contract or local law or usage to the contrary, a lease of immoveable

property, for agricultural or manufacturing purposes, shall be deemed to be a lease from year to year terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy." (Sec. 106).

Ques. What are the requisites of a valid notice to quit ? (Bom. 1925, Cal. 1914).

Ans.—**Requisites of a valid notice** :—Every notice must be in writing, (2) signed by or on behalf of the person giving it, (3) and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affix to a conspicuous part of the property. (Sec. 106). (4) The notice must be explicit and positive. (5) The notice to quit must require the tenant to vacate at the *end* of the year or the month, and *not before*.

Ques. What are the rights and liabilities of the Lessor ? (Bom. 1932, Adv. 1923, 1927)

Ans.—**Rights and Liabilities of the Lessor.**

In the absence of a contract or local usage to the contrary.

(a) The lessor is bound to disclose to the lessee any material defect in the property.

(b) The lessor is bound on the lessee's request to put him in possession of the property. The lessor must

not only show that the tenant is in possession of the subject of the lease, but that such possession was attributable to the lease or might be so—*Jogesh Chandra v. Emdad Meah*, 34 Bom. L. R. 487.

(c) The lessor is bound to secure to the lessee quiet possession and enjoyment of the property. (S. 108).

Ques. What are the rights and liabilities of a lessee of immoveable property? (Bom. 1927, 28, 31, Adv. 1925)

Ans:—Rights and Liabilities of the Lessee:—In the absence of a contract or local usage to the contrary:—

(1) The lessee has the right to enjoy accessions.

(2) The lessee can avoid the lease in case of eventual destruction of the property by any unforeseen event.

(3) The lessee may deduct the costs of any repairs which the lessor is bound to make to the property, with interest.

(4) The lessee may deduct such payments made by him for the lessor which the lessor was bound by law to pay, with interest from the rent, or otherwise recover them from the lessor.

(5) The lessee may even after the determination of the lease, remove, at any time whilst he is in possession of the property leased but not afterwards, all things which he has attached to the earth; provided he leaves the property in the state in which he received it.

(6) The lessee has the right to take emblements.

(7) The lessee may mortgage or sub-let his interest or any part thereof.

(8) The lessee is bound to disclose certain material facts known to him and unknown to the lessor.

(9) The lessor is bound to pay or tender the contracted rent regularly.

(10) The lessee is bound to maintain and restore the property in condition in which it was at the time of the lease.

(11) The lessee is to give, with reasonable diligence, notice of any encroachments to the lessor.

(12) The lessee may make only reasonable use of the property but cannot commit waste.

(13) The lessee must not, without the lessor's consent, erect on the property, any permanent structure, except for agricultural purposes.

(14) On the determination of the lease, the lessee is bound to put the lessor into possession of the property. (Sec. 108).

Ques. State how are the rights of lessor's transferee governed by the T. P. Act? (Bom. 1935).

Ans —Rights of lessor's transferee :—" If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased." S. 109.

By transferring a lease the lessor can assign all his rights but he cannot assign his liabilities without the consent of the lessee.

A lessee without notice of the assignment is not only protected as regards the payment of rent but also if the lessee surrenders the lease to the lessor, he will be acquitted if he had no notice of the transfer, actual or constructive.

Ques. What are the modes by which a lease of immoveable property is determined ? (Bom. 1926, 29, 30, 34 ; Adv. 1923, 29, 31, 34 ; Cal. 1930, 31, 33 ; All. 23, 1925).

*Ans :—Determination of Lease :—*A lease of immoveable property determines.

(a) By efflux of the time limited thereby.

(b) Where such time is limited conditionally on the happening of some event—by the happening of such event.

(c) Where the interest of the lessor in the property terminates on, or his power to dispose of the same extends

only to, the happening of any event—by the happening of such event;

(d) By merger—in case the interests of the lessee and the lessor in the *whole* of the property become vested at the same time in one person in the same right; i. e. when the right of the lessee *merges* in that of the lessor

(e) By express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor by mutual agreement between them.

(f) By implied surrender

(g) By forfeiture; that is to say,

(1) in case the lessee breaks an express condition which provides that, on breach thereof the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in the third person, or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee *gives notice in writing to the lessee of his intention to determine the lease*;

(h) On the expiration of notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. (S. 111)

Ques. What is forfeiture of a lease? What are the conditions to be satisfied before the denial of the landlord's title by the tenant operates a forfeiture. (Bom. 1927, Adv. 32; Cal. 30, 32).

Ans:—Forfeiture of a lease:—A lease is determined forfeiture, that is to say—(1) in case the lessee breaks

an express condition which provides that, on breach thereof the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person, or by claiming title in himself; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event. Although a lessee may incur forfeiture of his lease in any of these cases still the lessor cannot enforce the forfeiture unless he or his transferee "gives notice to the lessee of his intention to determine the lease." These words have now been substituted for the words "does some act showing his intention to determine the lease" as it was not clear as to what act should be done to determine the lease.

Denial of landlord's title :—Forfeiture by denial of landlord's title arises as soon as the lessee disclaims his lessor's right by setting up a title in a third person or by claiming title in himself. In order to give rise to a forfeiture the following conditions must be satisfied—(1) the disclaimer of title must be unequivocal; it may be by parole declarations and brought home to the knowledge of the landlord; and (2) it must have been made *before* the suit for ejectment has been brought; and (3) the lessor or his transferee has given notice in writing to the lessee of his intention to determine the lease. The institution of a suit for ejectment was held to be a sufficient manifestation of such intention in *Isabali V Mahadu* 42 Bom. 195, but this is now no longer correct. In *Narayan v. Mangesh* 34 Bom. L R. 1287, it has been held that the conduct of the defendants, who were permanent tenants, in partitioning the lands and passing the sale and mortgage deeds the knowledge of the landlord did not amount to a denial of the landlord's title so as to incur the penalty of forfeiture under Sec. 111 (G) (2).

A denial of landlord's right to enhance the rent or the setting up of a permanent tenancy is not necessarily a disclaimer of his title as landlord. The denial of landlord's title by the original lessee will not work as a forfeiture against the *assignee* of the lessee—*Gopal V. Shrinivas* 42 Bom 734.

Ques. How does waiver of forfeiture of a lease take place ? (Bom. 1933).

*Ans :—*Waiver of forfeiture :—“ A forfeiture under Sec 111 (g) is waived (1) by acceptance of rent which has become due since the forfeiture, or (2) by distress for such rent, or (3) by any other act on the part of the lessor showing an intention to treat the lease as subsisting .

Provided that the lessor is aware that the forfeiture has been incurred.

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not waiver.” Sec. 112.

Acceptance of the rent even under protest amounts to an acceptance under this section sufficient to operate as waiver. Forfeiture may be waived by subsequent demands for rent. The general rule is that if a lessor or the person legally entitled to reversion, *knowing* that a forfeiture has been incurred by the breach of any covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at a later period, he thereby waives such forfeiture.

Ques. Under what circumstances can the Court relieve a lessee against forfeiture for non-payment of rent ? (Bom. 1935. Mad. 1904, All. 1925).

Ans.—Relief against forfeiture for non-payment of rent—Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, the Court may, in lieu of making a decree of ejectment, pass an order relieving the lessee against the forfeiture, if, at the hearing of the suit the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, thereupon the lessee shall hold the property leased as if the forfeiture had not occurred. (S. 114).

Provisions for forfeiture of leases for non-payment of rent are intended merely as a security for the non-payment of rent, and a Court of Equity will relieve the lessee and set aside a forfeiture. This principle of English law has been recognised by the legislature in Sec. 114, and Sec. 114—A has been newly enacted to give relief against forfeiture due to other causes. The expression “rent in arrear” includes *time-barred* rents. In a case where the lessee tenders the amount of rent *before* the institution of the suit and the lessor refuses to accept it and files a suit for ejectment, he does so at his own risk, and the lessee will not be liable to forfeiture nor to pay the costs of the suit—17 Mad 216.

Ques. Is there any provision in the T. P. Act for relieving a lessee against forfeiture in cases other than non-payment of rent ?

Ans.—Relief against forfeiture in certain other cases:—Prior to the introduction of Sec. 114—A in the T. P. Act by the T. P. Amendment Act, of 1929, relief against forfeiture for non-payment of rent only was provided for in Sec. 114 of the Act; and there was no

relief in cases where forfeiture accrued on breach of an express condition, although the breach may be capable of easy remedy. This caused considerable hardship, the Legislature accordingly introduced Sec. 114A which runs thus.—“Where a lease of immoveable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing :—

(a) specifying the particular breach complained of ; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach ;

and the lessee fails, within a reasonable time from the date of service of notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased or to an express condition relating to forfeiture in case of non-payment of rent.”

Ques. What is the effect of surrender and forfeiture of lease on an under-lease and an assignment of the lease ? (Bom. 1932 Cal. 22)

Ans.—The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease ; but unless the surrender is made for the purpose of obtaining a new lease, the rent payable by,

and the contracts binding on, the under-lease shall be respectively payable to, and enforceable by the lessor

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessee in fraud of the under-leases, or relief against the forfeiture is granted under Sec 114. (S. 115).

It is a rule of law that if there is a lessee, and he has created an under-lease then if the lease is *forfeited*, the under-lessee loses his interest as well as the lessee himself; but if the lessee *surrenders*, he cannot by his own voluntary act in surrendering prejudice the estate of the under-lessee, or the person who claims under him.

This section is confined only to under-leases, and does not apply to the assignee of a lessee. Therefore a denial of the lessor's title by the original lessee will not work a forfeiture against the *assignee* of the lessee—*Gopal Jaywant v. Shrinwas* 20 Bom. L. R. 820.

Under this section the sub-lease becomes void only when the original lease becomes *forfeited*; if the interest of the original lessee is not forfeited but merely sold in execution of a decree obtained against him by his lessor for arrears of rent, the interest of the sub-lessee is not affected by such sale—*Vishnu Atmaram v. Anant Vishnu* 14 Bom. 384.

Ques. What are the legal effects of a tenant holding over after the determination of his lease? (Bom. 1925, 26, 33, 34, Mad. 1935)

*Ans:—Effect of holding over—*If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the

lessee, or underlessee or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106. (S. 116).

Illustrations—(a) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(4) A lets a firm to B for the life of C. C dies but B continues in possession with A's assent. B's lease is renewed from year to year.

Thus the legal effects of a tenant holding over are:—

(1) that if after the termination of the lease, the tenant continues in possession, and the landlord accepts the rent or otherwise gives consent to his remaining in possession, such action has the effect of converting the tenant by sufferance into a tenant-at-will; and (2) that in the absence of a contract to the contrary, the duration of the renewed lease shall be regulated according to the purpose of the lease, irrespective of the term of the original lease.

But in all other respects, viz., the rate of rent, rate of interest etc, the tenant continues to hold on the same stipulations as are mentioned in the original lease.

Ques. What distinction can be drawn between a “tenant by sufferance” and “a tenant at-will”? How are the rights of a landlord regulated against them? (Bom. 1925, 34, Adv. 32).

Ans.—A tenant continuing in possession after the determination of the lease, *without* the consent of the landlord is called a tenant ‘*by sufferance*,’ and a tenant doing so *with* the landlord’s consent is called a ‘tenant holding over’ or a *tenant-at-will*.

The difference between a tenancy by sufferance and a tenancy at will is that in the one case the tenant holds wrongfully and against the will and permission of the lord, and has no estate at all in the occupied premises ; in the other the tenant holds by right and has an estate or term in the land, precarious though it may be, and the relation of the lessor and lessee subsists between the parties. A tenant by sufferance therefore, is no better than a mere trespasser and he can be turned at any time without any notice to quit. But entirely different is the position of a tenant holding over, whose possession continues with the consent of the landlord and is therefore not wrongful and he cannot be ejected without due notice.—(*Chatur v. Mukund* 7 Cal. 710)

Chapter VI.

Of Exchanges.

Ques. Define “Exchange.” What are the essentials of an exchange under the T. P. Act ? (Bom. 1927, Cal. 1913).

Ans.—Exchange defined :—“ When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being

money only, the transaction is called an "exchange." Sec. 118.

Essentials of an exchange :—The three essentials of an exchange as defined in Sec. 118 are :—(1) That there must be mutual transfer of ownership of two things, it differs in this respect from partition in which there is no *transfer* but mutual arrangement between the parties. In other words, an exchange is a transaction by which a party acquires a property in which he had *no interest before*, but in a partition the parties who already possess definite interest in the property make a convenient arrangement between themselves for enjoyment of the property. (*Distinguish between 'Sale' and 'Exchange.'* (Bom. 33, Adv. 30).

(2) That in an exchange no price is paid but one specific property is transferred for another. In this respect it differs from a sale because sale is always for price which means money or the current coin of the realm.

But payment of price may be made in *addition* to the transfer of property to equalise the consideration and such payment does not make the exchange lose its character as such. Money may be exchanged for money. (Sec. 121) The change of currency notes for money is merely an exchange of money in one form for money in another form. A transfer of a Court-fee stamp on promise of a stamp of equal value being returned is not a sale but an exchange —*Kedar Nath V. Emperor* 30 Cal 921.

(3) that an exchange of immoveable property of Rs. 100 or upwards can only be effected by means of a registered instrument. Non-registration of a document can however be cured by the doctrine of part-performance as enunciated in Sec. 53-A T. P. Act.

Ques. What are the rights of a party deprived of the thing received in exchange by reason of a defect in the title of the other party. (Cal. 1913, 17).

Ans.—Right of party deprived of the thing received in exchange:—It is stated in Sec. 119 T. P. Act thus—
“If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him (1) for loss caused thereby, or at the option of the person so deprived, (2) for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.” The remedy provided for by this section is thus either the return of the whole thing transferred or compensation. This section does not exclude the operation of Sec. 43 T. P. Act; so that if the party having a defective title afterwards acquires full title, the other party will be entitled to its benefit see—*Bhairab V. Jiban* 33 C. L. J. 184.

Ques. What are the provisions of the T. P. Act governing exchanges of properties? (Bom. 1925).

Ans:—The provisions of the T. P. Act governing exchanges are —

(1) In an exchange, there must be *transfer of ownership* of one thing for the ownership of another.

(2) Exchange is possible only when neither thing is money, or when both the things are money. There can be no exchange of a thing for money, as then it will become a sale.

(3) A transfer of property in completion of an exchange can be made only by a registered document in the case of immoveable property worth Rs. 100 or upwards. (Sec 118).

(4) In the absence of a contract to the contrary, the party deprived of the thing or part thereof received by him in exchange by reason of any defect in title of the other party is entitled at his option, to compensation, or to return of the thing transferred by him. (Sec. 119).

(5) Rights and liabilities of parties to an exchange are save as provided by this chapter, similar to those to which the seller and buyer are subject under Sec. 55 T. P. Act. (Sec. 120).

(6) On the exchange of money, each party thereby warrants the genuineness of money given by him. (Sec. 121). The aggrieved party is entitled to recover the money paid by him as upon a failure of consideration.

Chapter VII

Of Gifts.

Ques. How is a gift defined in the T. P. Act? (Adv. 1929, Cal. 1930, 31).

Ans.—Gift defined—"Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person called the

donor, to another called the donee, and accepted by or on behalf of the donee " Sec. 122.

Ques. How can a transfer by way of gift be effected ? (Adv. 1929, Cal. 27, 33)

Ans —**Transfer of gift how effected:**—For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

"For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid, or by delivery.

"Such delivery may be made in the same way as goods sold may be delivered." Sec. 123.

This section does not affect the essential ingredients of a complete gift viz., voluntary giving by the donor and acceptance by the donee or on behalf of the donee but only provides a further safeguard by requiring a gift of immoveable properties to be effected by a registered instrument. Therefore, the registration of deed of gift was not sufficient to constitute a gift where it was found that inspite of the registration the donor continued to be in possession of the property.

It is not necessary for the validity of a deed of gift that it should be registered by the donor himself, or that the registration should take place during the life time of the donor. Registration is not the act of the donor but the act of an officer appointed by law to register documents. Consent to the registration of the deed is not a part of the gift. Therefore, neither death nor express revocation by the donor is a ground for refusing registration if the other conditions are complied with, and the

deed of gift would take effect from the date of execution and not from the date of registration—See *Kalyan-Sundaram v. Karuppa* 50 Mad 193 (P.C.) and *Venkati Rama v. Pillati Rama* 40 Mad. 204 (F.B.) A gift to God is not gift to a “living person” and consequently does not require a registered instrument—*Haribhai v. Guru Granth Saheb* A I R. 1930 Pat 610

Ques. What are the essentials of a valid gift according to the T. P. Act? How far has this Act modified the Hindu and Mohammeden Law relating to gift? (Bom. 1925, 27, 30 Adv. 1922, 29, 32.)

*Ans:—*The requisites of a valid gift are—(1) There should be a donor and a donee and both must be *living* (2) The subject of gift must be *existing* and capable of transfer; (3) The gift should be made *voluntarily* and *without consideration*; (4) there should be an *acceptance* by or on behalf of the donee during his life time; (5) there should be a transfer on the part of the donor (6) the acceptance must be at a time when the donor is alive and is capable of giving; (7) When the property is immoveable whether below Rs. 100 or upwards there must be a registered instrument properly attested; (8) In case of immoveable property there must be either a registered instrument properly attested or delivery of possession.

The provisions of the Chapter on Gifts are based on general principles and do not conflict with the rules of Hindu or Buddhist law; except in one instance—under the Hindu law there could not be any valid gift without delivery of possession but this rule of Hindu law (and Buddhist law) has been abrogated by Sec. 123 of the T. P. Act. Under this section a gift of moveable or im-

moveable property may be effected by a registered instrument without delivery

The provisions of the Chapter on Gifts do not affect any rule of Mohamedan Law. Thus under Mohamedan law a gift of immoveable property may be made orally by simple *delivery of possession*, although the T P Act does not require delivery of possession in a gift of immoveable property. So also registration is not necessary in Mohamedan gifts. So again, the rules of Mohamedan law as to the revocation of gifts are entirely different from the rule enacted in Sec. 126, and therefore the Mohamedan law shall prevail.

Ques. Discuss the various provisions of the T. P. Act under which a gift is held to be wholly or partially void (Bom 1930, 32).

*Ans:—*The provisions of the T P. Act under which a gift is held to be void :—

(1) "If the donee dies before acceptance, the gift is void"—Sec. 122 as by the donee's death acceptance is rendered impossible and without acceptance a gift is not complete. Acceptance of the gift must take place during the life-time of the donor although registration of the deed may take after the donor's death.

(2) "A gift comprising both existing and future property is void as to the latter"—Sec. 124, as a valid gift involves the *existence* of the property. There can be no alienation of a thing not in existence.

(3) "A gift of a thing to two or more donees of whom one does not accept it, is void as to the interest which he would have taken had he accepted"—Sec. 125. This section lays down that a gift is personal to the

donee, and therefore if a gift is made to two persons jointly and one of them does not accept it, the other cannot take the whole by survivorship. The English law, however, lays down a contrary rule.

(4) "A gift, which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be"—Sec. 126.

Illustration:—A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000 which continue to belong to A.

Ques. When may a gift of immoveable property be suspended are revoked? (Bom. 1926, Cal. 22, 31, All. 24, 26).

Ans:—The donor and donee may agree that, on the happening of any *specified* event *which does not depend on the will of the donor*, a gift shall be suspended or revoked; but a gift, which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want of failure of consideration) in which, if it were a contract, it might be rescinded. e. g. when the gift is made under coercion, undue influence, misrepresentation etc.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice, (S. 126)

Ills. (1) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's life time, A may take back the field.

(2) A gives a lakh of rupees to B reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000 but is void as to Rs. 10,000 which continue to belong to A.

The only circumstances under which a gift may be revoked are specified in paras 1 and 2. A gift is not revokable otherwise. The donor cannot set aside the gift once made on the plea that he had made a mistake or he had supposed that the donee could perform his funeral rights; or on account of the mere fact that the donor's feelings towards the donee change after the deed of gift was executed.

Ques. What is meant by "Onerous gift"? Is a donee at liberty to accept it in part? What would be the effect of such a gift to a disqualified person? (Bom. 1927, 33, Adv. 28, 34, Mad. 34).

*Ans. :—Onerous gift :—*A gift is said to be *onerous* when the subject of gift is burdened by an obligation. The principle underlying onerous gift is that when a gift is in the form of a *single* transfer to the same person of several things of which one is and the others are not burdened by an obligation the donee can take nothing by the gift unless he accepts the burden as well as the benefit of the gift. (Sec. 127). He cannot pick up the benefits of the transaction and reject the burden. But where a gift is in the form of two or more *separate and independent*

transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others although the former may be beneficial and the latter onerous.

If an onerous gift is made to a disqualified person, e. g. a minor, and that person accepts it, he is not bound by his acceptance but can make his choice upon attaining majority either to accept the gift burdened with the obligation or to return it. But so far as the donor is concerned the gift is complete as against him and if therefore the donee dies in his infancy, the property will in such a case pass to the heirs of the donee. (*Subramania v. Lakshmi*, 20 Mad. 147.)

Ques. Who is an "Universal donee" and what are the liabilities of such a donee? (Bom. 1925, 27, Adv. 28, 31).

*Ans:—*An "universal donee" is one to whom the donor's *whole* property is given and who consequently becomes personally liable for all the *debts* due by and *liabilities* of the donor at the time of the gift to the extent of the property comprised in the gift. (S. 128).

The essential condition to constitute a universal donee is that the gift must consist of the donor's *whole* property. If any portion of the donor's property, no matter whether it is moveable or immoveable, is excluded from the operation of the gift or the endowment, the donee is not a universal donee. The creditor is entitled to the benefit of this section (128) against a person who is a universal donee and nothing short of a universal donee—*Shyam Behari V. Maha Prasad*, A. I. R. 1930 All. 180.

Gifts of one's *whole* property to a relation or friend are not uncommon before an execution or in anticipation

of insolvency. For such cases of fraud, Sec. 53 T. P. Act provides when the property is land But an universal gift may conceivably be honest and comprise moveable property. Sec. 128 therefore specially provides for such gifts.

The rule in section (128) is different from that in England. Under the English law, a universal donee is not bound to discharge the donor's debt except on the latter's death or insolvency or when the transfer is made with intent to defraud creditors.

Chapter VIII

Of Transfers of Actionable Claims

Ques. How can the transfer of an actionable claim be effected ? (Bom. 1926, 30).

*Ans:—*Transfer of an actionable claim how effected:—The transfer of an actionable claim whether with or without consideration can only be effected by the execution of an instrument in writing signed by the transferor or his duly authorised agent and shall be complete and effectual upon the execution of such instrument. (S. 130). The provisions of Sec. 54, 59 and 123 regarding sales, mortgages and gifts do not apply to a sale, mortgage or gift of an actionable claim. A gift of an actionable claim may therefore be made without a registered instrument as required by Sec. 123. The transfer can only be made in writing, an oral transfer is not valid. So also mere deposit or mere

delivery of policy of life insurance or a promissory note without any written transfer does not effect a transfer. Similarly, when A had effected a policy of insurance upon his own life and it was expressed to be for the benefit of his wife, *held* that in the absence of an assignment in writing, the beneficial interest under the policy would not pass to A's widow upon his death—*Shankar v. Umabar*, 37 Bom. 471. No particular words are necessary to effect a transfer of an actionable claim, if the intention to transfer is clear from the language used. Landlord assigning his right to be reimbursed in respect of payment of Government revenue etc, made by him on default by the lessee is not a transfer of a 'mere right to sue' but of an 'actionable claim' within the meaning of Sec. 130 of the Act—*Manmath Nath Mallick v. Hedart Ali* 34 Bom. L. R. 489.

Ques. How far is notice material in the case of a transfer of actionable claim ?

*Ans:—Notice:—*A transfer of an actionable claim is complete when the instrument has been executed. Notice of transfer to the debtor is not necessary for the validity of the transfer. But the position of the transferee is not secure unless there be the necessary notice. In other words, if the debtor who pays the debt to the original creditor, not having *express* notice of the transfer nor being a party to the transfer, will not be bound to pay it over again to the assignee—*Gopal Krishna v. Gopal Krishna* 34 Mad. 123. Where there are two transferees, the transferee who first gives notice to the debtor does not acquire any priority over the other transferee, but the transferees take in the order of the date of transfer—*Viswanath v. Mulraj* 13 Bom. L. R. 590. Though there be a valid transfer of a debt between the transferor and the

transferee the person bound to pay the debt is not bound by the transfer unless he receives an express notice in writing from the transferor or his agent or if he refuses to sign, from the transferee or his agent, stating the name and address of the transferee in conformity with the provision of Sec. 131.—*Basant Singh v. Burma. Ry. Co. Ltd.* 8 Bur. L. T. 266.

Ques. What are the rights and liabilities of a transferee of an actionable claim ?
(Bom. 1930)

Ans:—Rights of a transferee of an actionable claim:—Upon the execution of the deed of transfer all the rights and remedies of the transferor, whether by way of damages or otherwise, vest in the transferee, whether such notice as is provided in Sec. 131 be given or not. The transferee may, upon the execution of the deed of transfer, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceeding, and without making him a party thereto (S. 130). The transferor can no longer sue, and he may be restrained by an injunction from suing for his own benefit or an action may be brought against him if he defeats his own assignment by getting in the debt or releasing it.

Liabilities of a transferee :—The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of transfer.—Sec. 132. Thus, the debtor has a right to set off any counter-claim against the assignee which he would have done against the assignor. Such a set-off is enforceable even though the plaintiff was the purchaser of an actionable claim in *Court auction*.

A pledge of a promissory note vests in the pledgee all the rights and remedies of the pledgor subject to all equities which remained with the pledgor. The pledgee is the only person entitled to sue for the debt due under the pro-note and if he omits to sue and allows the debt to become time-barred, he is accountable to the pledgor for the amount of the debt—*Muthu Krishna v. Veerara-chava* 38 Mad. 297, following *Mulrai v. Viswanath* 37 Bom. 198 (P. C).

Ques. Who are disqualified to buy an actionable claim and why ? (All 1926).

Ans:—Incapacity of officers connected with Courts of Justice:—"No Judge, legal practitioner, or officer connected with any Court of Justice shall buy, or traffic in, or stipulated for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce at his instance or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid." Sec. 136.

The object of the Legislature in enacting this section is that the persons mentioned in this section should not be placed in a position in which they be tempted to use their influence or the information which they may acquire by virtue of their possible connection with the transaction of business in the Court, to the prejudice of persons who might have the resort to it for the adjudication of actionable claim.

Thus, a pleader is guilty of unprofessional conduct if he purchases an actionable claim, especially so if the purchase be speculative, as when a suit has been instituted on the claim, and the claim is ripe for judgment and the seller is his own client unable to judge the result of the suit—*Mum Reddy v. Venkkata Row* 37 Mad. 238. The

word 'buy' in the section refers to private sales and not to *sales in execution* i. e. to Court-sales, therefore there is nothing to prevent a pleader from purchasing the property of his client sold in Court. This section prohibits a legal practitioner from *purchasing* an actionable claim; but a *sale* of an actionable claim by a pleader is not invalid—*Hirdy Narayan v. Jagat Prasad*, A. I. R. 1927 Pat. 2.

Ques. Is the transferee of a negotiable instrument subject to the liabilities of a transferee of an actionable claim ?

Ans:—Negotiable instruments. The negotiable instruments have been exempted from the operation of Chapter VIII (on actionable claims) by sec. 137, because their assignment is regulated mostly by the provisions of the Negotiable Instruments Act. The usual mode of transfer of Negotiable instruments is endorsement or delivery. But such instruments are nevertheless choses in action, and as such may be transferred by assignment. The important difference between transfer by endorsement and transfer by assignment of a negotiable instrument is that in the case of an assignment, the assignee will acquire no more than the right, title and interest of his assignor, whereas in the case of an endorsement the endorsee will have all the rights and advantages of a holder in due course—*Mahammad Khumar Ali v. Ranga Rao*, 24 Mad. 624. The transferee of an actionable claim takes it subject to all the liabilities and equities to which the transferor was subject, while the transferee of a negotiable instrument takes it free from any such liabilities and thus forms an exception to the general rule that a transferee takes no better title than his transferor based on the maxim 'Nemo dat quod non habet'—no one can give that which he has not. Comp. Sec. 108 of the Contract Act.

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The Transfer of Property Act, 1882.

(ACT IV OF 1882).

[*As modified upto 1st January 1934.*]

*An Act to amend the law relating to the Transfer of Property
by Act of Parties.*

WHEREAS it is expedient to define and amend certain Preamble. parts of the law relating to the transfer of property by act of parties ; It is hereby enacted as follows. —

CHAPTER I.

Preliminary.

1. This Act may be called the Transfer of Property Short title Act, 1882.

It shall come into force on the first day of July, Commence- 1882:
ment,

It extends in the first instance to the whole of Extent British India except the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of the Punjab and the Chief Commissioner of British Burma.

But any of the said Local Governments may, from time to time, by notification in the local official Gazette, extend this Act (or any part thereof) to the whole or any specified part of the territories under its administration.

And any Local Government may, from time to time, by notification in the local official Gazette, exempt, either retrospectively or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely —

Sections 54, paragraphs 2 and 3, 59, 107 and 123.

Notwithstanding anything in the foregoing part of this section, sections 54, paragraphs 2 and 3, 59, 107 and 123 shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1908, under the power conferred by the first section of that Act or otherwise.

2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect —

(a) the provisions of any enactment not hereby expressly repealed.
Repeal of the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect —
Saving of certain enactments, incidents, rights, liabilities, etc

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability or

(d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law

or by, or in execution of a decree or order of a Court of competent jurisdiction .

and nothing in the second chapter of this Act shall be deemed to affect any rule of Muhammadan law.

3. In this Act, unless there is something repugnant Interpretation in the subject or context, :—
clause

“immoveable property” does not include standing timber, growing crops or grass ;

“instrument” means a non-testamentary instrument ;

“**attested**,” in relation to an instrument, means, and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant ; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

“registered” means registered in British India under the law for the time being in force regulating the registration of documents :

“**attached to the earth**” means --

- (a) rooted in the earth, as in the case of trees and shrubs ;
- (b) imbedded in the earth, as in the case of walls or buildings ; or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached .

“**actionable claim**” means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

a person is said to have “notice” of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation 1, :— Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated.

Provided that :—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under section 51 of that Act, and,

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Act.

Explanation II. :— Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III. :— A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material.

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

4. The chapters and sections of this Act which Enactments relating to contracts shall be taken as part of the Indian Contract Act, 1872.
taken as part of Contract Act.

And sections 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908.

CHAPTER II.

Of Transfers of Property by Act of Parties.

A. :— Transfer of Property, whether moveable or immoveable.

5. In the following sections “**transfer of property**” “**Transfer of** means an act by which a living person property” **defined** conveys property, in present or in future, to one or more other living persons, or to himself or to himself and one or more other living persons; and “to transfer property” is to perform such act.

(4) In this section “living person” includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

6. Property of any kind may be transferred, except **What may be transferred.** as otherwise provided by this Act or by any other law for the time being in force.

- (a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred
- (b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.
- (c) An easement cannot be transferred apart from the dominant heritage.
- (d) An interest in property restricted in its enjoyment

to the owner personally cannot be transferred by him.

- (dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.
- (e) A mere right to sue cannot be transferred.
- (f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.
- (g) Stipends allowed to military, air-force and civil pensioners of Government and political pensions cannot be transferred.
- (h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be transferee
- (i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards to assign his interest as such tenant, farmer or lessee.

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forth-
Operation of transfer with to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth,

and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

9. A transfer of property may be made without Oral transfer. writing in every case in which a writing is not expressly required by law.

10. Where property is transferred subject to a con-
Condition dition, or limitation absolutely restraining the
restraining transferee or any person claiming under him
alienation from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: Provided that

property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

12. Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the

same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and, after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

14. No transfer of property can operate to create **Rule against an interest which is to take effect after the perpetuity.** lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails in regard to those persons only and not in regard to the whole class.

16. Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

17. (1) Where the terms of a transfer of property **Direction for accumulation.** direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than:—

(a) the life of the transferor, or

(b) a period of eighteen years from the date of the transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of —

(i) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

(ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(iii) the preservation or maintenance of the property transferred,

and such direction may be made accordingly.

18. The restrictions in sections 14, 16 and 17 shall **Transfer in perpetuity for benefit of public** not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the

event, in the latter, when the happening of the event becomes impossible.

Exception — Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Illustration.

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them C dies during the life of B, D survives B At B's death the property passes to D.

25. An interest created on a transfer of property **Conditional transfer.** and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Illustrations.

(a) A lets a farm to B on condition that he shall walk a hundred miles in an hour The lease is void

(b) A gives Rs 500 to B on condition that he shall marry A's daughter C At the date of the transfer C was dead The transfer is void.

(c) A transfers Rs 500 to B on condition that she shall murder C. The transfer is void.

(d) A transfers Rs 500 to his niece C if she will desert her husband The transfer is void

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations.

(a) A transfers Rs 5,000 to B on condition that he shall marry with the consent of C, D and E E, dies B marries with the consent of C and D, B is deemed to have fulfilled the condition.

(b) A transfers Rs 5,000 to B on condition that he shall marry with the consent of C, D and E B marries without the consent of

C D and E, but obtains their consent after the marriage B has not fulfilled the condition

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations

(a) A transfers Rs 500 to B on condition that he shall execute a certain lease within three months after A's death, and, if he should neglect to do so, to C B dies in A's life-time The disposition in favour of C takes effect

(b) A transfers property to his wife, but, in case she should die in his life-time, transfers to B that which he had transferred to her A and his wife perish together under circumstances which make it impossible to prove that she died before him The disposition in favour of B does not take effect.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case

the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25, and 27.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration.

A transfers Rs 500 to B to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect

30. If the ulterior disposition is not valid, the prior disposition is not affected by its invalidity.

Illustration.

A transfers a farm to B for her life, and, if she do not desert her husband, to C. B, is entitled to the farm during her life as if no condition had been inserted.

31. Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations

(a) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life interest in the farm

(b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his

interest in the farm shall cease, B does not go to England within the term proscribed His interest in the farm ceases

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled

Election.

35. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it, and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations

The farm of Sultanpur is the property of C and worth Rs 800 A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs 1,000 to C. C, elects to retain the farm He forfeits the gift of Rs. 1000

In the same case, A dies before the election His representative must out of the Rs 1,000 pay Rs 800 to B

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his own capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.— Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine, C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon

the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes, unless and until the Local Government by notification in the official Gazette so directs.

Illustrations.

(a) A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs 30 and delivery of one fat sheep, B having provided half the purchase money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. $7\frac{1}{2}$ to C, and Rs. $7\frac{1}{2}$ to D, and must deliver the sheep according to the joint direction of B, C and D

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving

(B) Transfer of Immoveable Property.

38. Where any person, authorised only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alle-

ging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B. satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

39. Where a third person has a right to receive maintenance or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property, of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property or

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration

A contracts to sell Sultanpur to B. While the contract is still

in force he sells Sultanpur to C, who has notice of the contract B may enforce the contract against C to the same extent as against A.

41. Where, with the consent, express or implied, Transfer by of the persons interested in immovable ostensible owner property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

42. Where a person transfers any immoveable property Transfer by reserving power to revoke the transfer, and person having authority to subsequently transfers the property for consideration to another transferee, such transfer transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration

A lets a house to B, and reserves power to revoke the lease, if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

43. Where a person fraudulently or erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition, but on B's dying A as heir obtains Z, C, not having rescinded the contract of sale, may require A to deliver Z to him.

44. Where one of two or more co-owners of Transfer by immovable property legally competent in that one co-owner behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part-enjoyment of the house.

45. Where immovable property is transferred for joint transfer consideration to two or more persons, and for considera- such consideration is paid out of a fund tion belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively,

they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations

(a) A, owning a moiety, and B and C each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mauza.

(b) A, being entitled to a life-interest in mauza Atrali and B and C to the reversion, sell the mauza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money, B and C to receive Rs. 400.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Illustration

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half an anna-share from each of the shares of B and C.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

50. No persons shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration.

A lets a field to B at a rent of Rs 50, and then transfers the field to C. B, having no notice of transfer, in good faith pays the rent to A. B, is not chargeable with the rent so paid.

51. When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

52. During the pendency in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council, of any suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint

or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

53. (1) Every transfer of immoveable property made **Fraudulent Transfer.** with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

53 A. Where any person contracts to transfer for **Part performance.** consideration any immoveable property by writing signed by him or on his behalf from

which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract.

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

CHAPTER III.

Of Sales of Immoveable Property.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property, of a value less than one hundred, rupees such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property is
 Contract for a contract that a sale of such property
 sale shall take place on terms settled between
 the parties.

It does not, of itself, create any interest in or charge on such property.

55. In the absence of a contract to the contrary,
 Rights and the buyer and the seller of immoveable property
 liabilities of respectively are subject to the liabilities, and
 buyer and seller. have the rights, mentioned in the rules next
 following, or such of them as are applicable to the
 property sold

(1) The seller is bound :—

- (a) to disclose to the buyer any material defect in the property (1) or in the seller's title thereto (1) of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;
- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power,
- (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

- (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;
- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents,
- (f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits,
- (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same

Provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every

person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require, and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident,

(4) The seller is entitled :—

- (a) to the rents and profits of the property till the ownership thereof passes to the buyer,
- (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, (1) any transferee without consideration or any transferee with notice of the non-payment (1) for the amount of the purchase money, or any part thereof remaining unpaid, and for interest on

such amount or part (1) from the date on which possession has been delivered. (1)

(5) The buyer is bound :—

- (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest,
- (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;
- (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller,
- (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled :—

- (a) Where the ownership of the property has

passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof ,

- (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, (1) to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount ; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

56. If the owner of two or more properties mortgaging them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.

Discharge of Incumbrances on Sale.

57. (a) Where immovable property subject to any Provision by Court for incumbrance & sale freed therefrom, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court

- (1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,— of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and
- (2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the incumbrance and any interest due thereon

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and

give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

CHAPTER IV.

Of Mortgages of Immoveable Property and Charges.

58. (a) A **mortgage** is the transfer of an interest "Mortgage," in specific immoveable property for the pur-
"mortgagor," pose of securing the payment of money ad-
"mortgagee," vanced or to be advanced by way of loan,
"mortgage- money," and an existing or future debt, or the performance
"mortgage- deed" defin. of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where, without delivering possession of the mort-
 Simple gaged property, the mortgagor binds himself
 mortgage. personally to pay the mortgage-money, and
 agrees, expressly or impliedly, that, in the event of his
 failing to pay according to his contract, the mortgagee
 shall have a right to cause the mortgaged property to
 be sold and the proceeds of sale to be applied, so far
 as may be necessary, in payment of the mortgage-money,
 the transaction is called a **simple mortgage** and the
 mortgagee a simple mortgagee.

(c) Where the mortgagor ostensibly sells the mort-
 Mortgage by gaged property —
 conditional sale.

on condition that on default of payment of the
 mortgage-money on a certain date the sale shall become
 absolute, or

on condition that no such payment being made the
 sale shall become void, or

on condition that on such payment being made the
 buyer shall transfer the property to the seller,

the transaction is called a **mortgage by conditional
 sale** and the mortgagee a mortgagee by conditional sale.

Provided that no such transaction shall be deemed
 to be a mortgage, unless the condition is embodied in
 the document which effects or purports to effect the sale ;

(d) Where the mortgagor delivers possession or ex-
 Usufructuary ssly or by implication binds himself to deliver
 mortgage possession of the mortgaged property to the
 mortgagee, and authorizes him to retain such possession
 until payment of the mortgage-money, and to receive the
 rents and profits accruing from the property or any part
 of such rents and profits and to appropriate the same in

lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an **usufructuary mortgage** and the mortgagee an usufructuary mortgagee.

(e) Where the mortgagor binds himself to repay the English mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an **English mortgage**.

(f) Where a person in any of the following towns, Mortgage by deposit of title-deeds, namely, the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, and in any other town which the Governor General in Council may, by notification in the Gazette of India, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a **mortgage by deposit of title-deeds**.

(g) A mortgage which is not a simple mortgage, a Anomalous mortgage mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an **anomalous mortgage**.

59. Where the principal money secured is one hundred Mortgage when to be by assurance. rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a

registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

59 A. Unless otherwise expressly provided reference to references to in this Chapter to mortgagors and mortgagees and mortgagors shall be deemed to include references to persons deriving title from them respectively.

Rights and Liabilities of Mortgagor.

60. At any time after the principal money has become due the mortgagor has a right on payment or tender, at a proper time and place of the mortgage-money to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished,

Provided that the right conferred by this section has not been extinguished by act of the parties or decree of a Court.

The right conferred by this section is called a **right to redeem** and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money

Nothing in this section shall entitle a person interested in a share only of the mortgaged property of portion of mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor

60 A. (1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance, but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.

60 B. A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.

61. A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, —

- (a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property, — when such money is paid,
- (b) where the mortgagee is authorized to pay himself from such rents and profits or any part thereof a part only of the mortgage-money when the term, if any, prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof or deposits it in Court as

hereinafter provided

63. Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

63A. (1) Where mortgaged property in possession of the mortgagee has during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement ;

and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent, per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.

64. Where the mortgaged property is a lease and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee :—

- (a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same ;
- (b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto ,
- (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged

property, pay all public charges accruing due in respect of the property ;

(d) and, where the mortgaged property is a lease that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage, and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts ,

(e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

65 A. (1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate, but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation — A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one half, the amount for the time being due on the mortgage.

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a **suit for foreclosure**.

Nothing in this section shall be deemed --

- (a) to authorize any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale, or

- (b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure, or
- (c) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or
- (d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

67 A. A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

68. (1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely —

- (a) where the mortgagor binds himself to repay the same;
- (b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient

within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so ;

- (c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor .
- (d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor ;

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause (a) or clause (b) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property.

69. (1) Notwithstanding anything contained in the Power of Trustees' and Mortgagees' Powers Act, 1866. sale when valid a mortgagee or, any person acting on his behalf, shall, subject to the provisions of this section have **power to sell** or concur in selling the mortgaged property, or any part thereof, in default of payment of

the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely.—

- (a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Local Government with the previous sanction of the Governor General in Council, in the local official Gazette
 - (b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the Secretary of State for India in Council,
 - (c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab or in any other town or area which the Governor General in Council may, by notification in the Gazette of India, specify in this behalf.
- (2) no such power shall be exercised unless and until—
- (a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service, or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised, but any person damaged by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale, and, secondly, in discharge of the mortgage-money and costs or other money, if any, due under the mortgage, and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

(5) Nothing in this section or in section 69 A applies to powers conferred before the first day of July, 1882.

69 A. (1) A mortgagee having the right to exercise Appointment of receiver a power of sale under section 69 shall, subject to the provisions of sub-section (2), be **entitled to appoint**, by writing signed by him or on his behalf, a

receiver of the income of the mortgaged property or any part thereof

(2) Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees, failing such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by

the mortgagee in accordance with the provisions of this section

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent, on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely --

(i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property

(ii) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver.

(iii) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage deed or under this Act, and

the cost of executing necessary or proper repairs directed in writing by the mortgagee ;

(iv) in payment of the interest falling due under the mortgage ,

(v) in or towards discharge of the principal money, if so directed in writing by the mortgagee ;
and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage deed , and the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit

The cost of every application under this sub-section shall be in the discretion of the Court.

(11) In this section, " the Court " means the Court which would have jurisdiction in a suit to enforce the mortgage.

70. If, after the date of a mortgage, any accession to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Illustrations

(a) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(b) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security B is entitled to the house as well as the plot.

71. When the mortgaged property is a lease and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

72. A mortgagee may spend such money as is necessary —
Rights of mortgagee in possession.

- (b) for the preservation of the mortgaged property from destruction, forfeiture or sale;
 - (c) for supporting the mortgagor's title to the property,
 - (d) for making his own title thereto good against the mortgagor, and,
 - (e) when the mortgaged property is a renewable leasehold, for the renewal of the lease,
- and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum: Provided that the expenditure of money by the mortgagee

under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property, and the premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent. per annum. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to re-instate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorised to insure.

73. (1) Where the mortgaged property or any part thereof or any interest therein is sold owing proceeds of revenue sale to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

74. Right of subsequent mortgagee to pay off prior mortgage. Repealed by S. 39 of Act 20 of 1929.

75. Rights of mesne mortgagee against prior and subsequent mortgagees. Repealed by S. 39 of Act 20 of 1929.

76. When, during the continuance of the mortgage, **Liabilities of the mortgagee takes possession of the mort-**
mortgagee
in posses- gaged property, .—
ion.

- (a) he must manage the property, as a person of ordinary prudence would manage it if it were his own,
- (b) he must use his best endeavours to collect the rents and profits thereof;
- (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay The Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold,

- (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;
- (e) he must not commit any act which is destructive or permanently injurious to the property,
- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in re-instating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;
- (g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported,
- (h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation rent in respect thereof, shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest and, so far as such receipts exceed any interest due, in reduction or discharge of the

mortgage-money, the surplus, if any, shall be paid to the mortgagor ;

- (1) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this Chapter, be debited with the loss, if any, occasioned by such failure.

77. Nothing in section 76, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Priority.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

79. If a mortgage made to secure future advances, Mortgage to secure uncertain amount when maximum is expressed the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration

A mortgages Sultanpur to his bankers, B & Co, to secure the balance of his account with them to the extent of Rs 10 000 A then mortgages Sultanpur to C to secure Rs 10,000, C having notice of the mortgage to B & Co, and C gives notice to B & Co, of the second mortgage. At the date of the second mortgage, the balance due to B & Co, does not exceed Rs 5000, B & Co, subsequently advance to A sums making the balance of the account against him exceed the sum of Rs, 10,000 B & Co, are entitled, to the extent of Rs 10,000, to priority over C

80. *Tacking abolished. Repealed by Act XX of 1929*

Marshalling and Contribution.

81. If the owner of two or more properties mortgages them to one person and then mortgages one securities or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract, to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties

82. Where property subject to a mortgage belongs Contribution to two or more persons having distinct and to mortgage-debt separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the subsequent mortgagee

Deposit in Court.

83. At any time after the principal money payable in Power to de- respect of any mortgage has become due and deposit in Court money due on mortgage before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

The Court shall thereupon cause written notice of Right to mo- the deposit to be served on the mortgagee, ney deposited by mortgagor and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed and all documents in his possession or power relating to the mortgaged property apply for and receive the money, and the mortgage-deed and all such other documents so deposited shall be delivered to the mortgagor or such other person as aforesaid

Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished

84. When the mortgagor or such other person as Cessation of aforesaid has tendered or deposited in Court interest on the mortgage, interest on the principal money shall cease from the date of the tender or in the case of a deposit, where no previous tender of such amount has been made as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out

of Court, and the notice required by section 83 has been served on the mortgagee .

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money, and such notice has not been given before the making of the tender or deposit, as the case may be.

Suits for Foreclosure, Sale or Redemption.

85. (*Parties to suits for foreclosure, sale and redemption*), *Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S 156 and Schedule V*

Foreclosure and Sale.

(**86 to 90**). *Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S 156 and Schedule V*

Redemption

91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of the mortgaged property, namely :

- (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same,
- (b) any surety for the payment of the mortgage-debt or any part thereof, or

- (c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

92. Any of the persons referred to in section 91 **Subrogation.** (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee

The right conferred by this section is called **the right of subrogation**, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

93. No mortgagee paying off a prior mortgage, whether Prohibition of tacking with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance

94. Where a property is mortgaged for successive Rights of debts to successive mortgagees, a mesne mort-
mesne mort- gagee has the same rights against mortgagees
gages
posterior to himself as he has against the mortgagor.

95. Where one of several mortgagors redeems the Right of re- mortgaged property, he shall, in enforcing his
deeming co- mortgagor to right of subrogation under section 92 against
mortgagor to expenses his co-mortgagors, be entitled to add to the
mortgage-money recoverable from them such proportion
of the expenses properly incurred in such redemption as
is attributable to their share in the property.

96. The provisions hereinbefore contained which apply Mortgage by to a simple mortgage shall, so far as may be,
deposit of title-deeds apply to a mortgage by deposit of title-deeds

97. (*Application of proceeds.*) *Repealed by the Code of Civil Procedure, 1908 (Act V of 1908).*

Anomalous Mortgages.

98. In the case of an anomalous mortgage the Rights and rights and liabilities of the parties shall be
liabilities of parties to an- determined by their contract as evidenced in
omalous the mortgage-deed, and, so far as such con-
mortgage. tract does not extend, by local usage.

99. (*Attachment of mortgaged property*) *Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), S. 156 and Schedule V.*

Charges.

100. Where immoveable property of one person is Charges, by act of parties or operation of law made
security for the payment of money to another, and the
transaction does not amount to a mortgage, the latter
person is said to have a charge on the property, and

all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge

101. Any mortgagee of, or person having a charge upon, immoveable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property, and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

Notice and Tender.

102. Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where no person or agent on whom such notice should be served can be found or is known to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.

Where no person or agent to whom such tender should be made can be found or is known to the person desiring to make the tender, the latter person may deposit in any Court in which a suit might be brought for redemption of the mortgaged property the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

103. Where, under the provisions of this Chapter, Notice, etc., a notice is to be served on or by, or a to or by person incompetent to contract— tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served on or by, or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking

out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract ; and the provisions of Order XXXII in the First Schedule to the Code of Civil Procedure, 1908 shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

104. The High Court may, from time to time, Power to make rules make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter

CHAPTER V.

Of Leases of Immoveable Property.

105. A lease of immoveable property is a transfer Lease defined of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee Lessor, is called the lessee, the price is called the lessee, pre- premium, and the money, share, service or rent defined other thing to be so rendered is called the rent.

106. In the absence of a contract or local law or Duration of certain leases in absence of written contract or local usage, usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of

either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy, and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

107. A lease of immoveable property from year to year, or for any term exceeding one year, or **Leases how made.** reserving a yearly rent, can be made only by a registered instrument

All other leases of immoveable property may be made either by registered instrument or by oral agreement accompanied by delivery of possession,

Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee

Provided that the Local Government may, with the previous sanction of the Governor General in Council, from time to time, by notification in the local official Gazette, direct that leases of immoveable property, other than leases from year to year or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession.

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of Rights and liabilities of lessor and lessee. immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased

(A) Rights and Liabilities of the Lessor.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover.

(b) the lessor is bound on the lessee's request to put him in possession of the property :

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(B) Rights and Liabilities of the Lessee.

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease :

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered

substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void.

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repair with interest from the rent, or otherwise recover it from the lessor

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor

(h) the lessee may even after the determination of the lease remove, at any time whilst he is in possession of the property leased but not afterwards all things which he has attached to the earth provided he leaves the property in the state in which he received it

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not,

by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.

nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition, and, when such defect has been caused by any act or default on the part of the lessee, his servants, or agents, he is bound to make it good within three months after such notice has been given or left :

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to

give, with reasonable diligence, notice thereof to the lessor .

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own, but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

109. If the lessor transfers the property leased, or Rights of any part thereof, or any part of his interest lessor's trans-
feree therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him .

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

111. A lease of immoveable property determines:-

- (a) by efflux of the time limited thereby :
- (b) where such time is limited conditionally on the happening of some event-by the happening of such event
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the

same extends only to, the happening of any event—by the happening of such event .

- (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right .
- (e) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them .
- (f) by implied surrender .
- (g) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself , or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease .
- (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f)

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease . This is an implied surrender of the former lease, and such lease determines thereupon

112. A forfeiture under section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture or by distress for such

Waiver of
forfeiture

rent, or by any other action on the part of the lessor showing an intention to treat the lease as subsisting

Provided that the lessor is aware that the forfeiture has been incurred

Provided, also, that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver

113. A notice given under section 111, clause (1), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting

Illustrations

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

114. Where a lease of immoveable property has been determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture, and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

114 A. Where a lease of immoveable property has ^{Relief against forfeiture in certain other cases} determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless the lessor has served on the lessee a notice in writing —

- (a) specifying the particular breach complained of, and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach,

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent.

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an ^{Effect of surrender and forfeiture on under-leases} under-lease of the property or any part thereof of previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease, but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section 114.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Illustrations

(a) A lets a house to B for five years B underlets the house to C at a monthly rent of Rs 100 The five years expire, but C continues in possession of the house and pays the rent to A C's lease is renewed from month to month

(b) A lets a farm to B for the life of C C dies, but B continues in possession with A's assent B's lease is renewed from year to year

117. None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the Local Government, may, by notification published in the local official Gazette declare all or any of such provisions to be so applicable in the case of all or any of such leases, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication

CHAPTER VI.

Of Exchanges.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an "exchange."

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

119. If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

120. Save as otherwise provided in this Chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

CHAPTER VII.

Of Gifts.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void

123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery

Such delivery may be made in the same way as goods sold may be delivered.

124. A gift comprising both existing and future property is void as to the latter.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked, but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.'

Illustrations

(a) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

127. When a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations

(a) A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company, in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b) A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

128. Subject to the provisions of section 127, where **Universal donee.** a gift consists of the donor's whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised therein.

129. Nothing in this Chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law.
Saving of donations mortis causa and Muhammadan law

CHAPTER VIII.

Of Transfers of Actionable Claims.

130. (1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not.

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party

to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception — Nothing in this section applies to the transfer of a marine or fire policy of insurance.

Illustrations.

(1) A owes money to B, who transfers the debt to C, B then demands the debt from A, who, not having received notice of the transfer, as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.

(11) A effects a policy on his own life with an insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132.

131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorised in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations

(1) A transfers to C a debt due to him by B, A being then indebted to B. C sues B for the debt due by B to A. In such

suit B is entitled to set off the debt due by A to him, although C was unaware of it at the date of such transfer

(ii) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled, B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A

133. Where the transferor of a debt warrants the Warranty of solvency of the debtor, the warranty, in the solvency of absence of a contract to the contrary, applies debtor only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

134. Where a debt is transferred for the purpose of Mortgaged securing an existing or future debt, the debt debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery. secondly, in or towards satisfaction of the amount for the time being secured by the transfer, and the residue, if any, belongs to the transferor or other person entitled to receive the same.

135. Every assignee, by endorsement or other writing, Assignment of rights under marine or fire of a policy of marine insurance or of a policy of insurance against fire, in whom the property policy of insurance. in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

136. No Judge, legal practitioner or officer connected Incapacity of officers connected with Courts of Justice with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his

instance, or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid.

137. Nothing in the foregoing sections of this Chapter Saving of negotiable instruments, etc applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation — The expression “mercantile document of title to goods” includes a bill of lading, dock-warrant, ware-house keeper’s certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

THE SCHEDULE.

Number and year	Subject.	Extent of repeal
(a) STATUTES.		
27 Hen, VIII, c 10	Uses ...	The whole
13 Eliz c 5	Fraudulent conveyances ..	The whole
27 Eliz, c. 4	Fraudulent conveyances ..	The whole
4 Wm and Mary c 16	Clandestine mortgages	The whole
(b) ACTS OF THE GOVERNOR GENERAL IN COUNCIL.		
IX of 1842	Lease and release	The whole
XXXI of 1854	Modes of conveying land	Section 17
XI of 1855	Mesne profits and improvements	Section 1, in the title, the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and"
XXVII of 1866	Indian Traustee Act	Section 31
IV of 1872	Funjab Laws Act	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806
XX of 1875	Central Provinces Laws Act	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806
XVIII of 1876	Oudh Laws Act	So far as it relates to Bengal Regulation XVII of 1806
I of 1877	Specific Relief	In sections 35 and 36, the word "in writing "
(c) REGULATIONS		
Bengal Regulation I of 1798	Conditional sales	The whole Regulation
Bengal Regulation XVII of 1806	Redemption	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts, Interest, Mortgagees in possession.	Section 15.

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